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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-130

PACIFIC WESTBOUND CONFERENCE and
FAR EAST CONFERENCE,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, CARNATION COMPANY, BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS and THE PORT OF NEW YORK AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
I. The case presents a question of administrative law which is very timely and important	8
II. The decision below is inconsistent with a decision of this Court with respect to review of F.M.C. decisions	10
III. The decision below is inconsistent with a recent decision of the same court with respect to activities authorized by an approved ratemaking agreement	12
Conclusion	14

APPENDIX A:

Opinion of the Court of Appeals	1a
Judgment	23a
Order Denying Petition for Rehearing	25a
Decision of Federal Maritime Commission	27a

APPENDIX B:

Administrative Procedure Act, Section 4	71a
Shipping Act, 1916, Section 15	72a

TABLE OF AUTHORITIES

Cases:

PAGE

Carnation Company v. *Pacific Westbound Conference and Far East Conference,* 383 U. S. 213 (1966) 3, 5, 6, 7

Carnation Co. v. *Pacific Westbound Conference,* 336 F. 2d 650 (9th Cir. 1964), rev'd on other grounds, 383 U. S. 213 (1966) 9

Consolo v. *Federal Maritime Comm'n,* 383 U. S. 607 (1966) 10, 11

Far East Conference v. *United States of America,* No. 15 Misc., October Term, 1951, 342 U. S. 570 9

Isbrandtsen v. *United States,* 211 F. 2d 51 (D. C. Cir. 1953), cert. denied *sub nom. Japan-Atlantic & Gulf Conference, et al.* v. *United States, et al.,* 347 U. S. 990 (1954) 9

Great Northern R. Co. v. *Merchants Elevator Co.,* 259 U. S. 285 (1922) 11

Overland and OCP Rates and Absorptions, 12 F.M.C. 184 (1969) 12, 13

Port of New York Authority v. *Federal Maritime Comm'n,* 429 F. 2d 663 (5th Cir. 1970), cert. denied, —— U. S. ——, 27 L. Ed. 2d 806 (No. 912, October Term, 1970, Feb. 22, 1971, 39 U. S. Law Week, 3358) 13

United States of America v. *Pacific Westbound Conference and Far East Conference, et al.,* Civil No. 46840, U. S. District Court for the Northern District of California 7

United States v. *Western Pacific R. Co.,* 352 U. S. 59 (1956) 11

Statutes:

	PAGE
46 USCA § 1111	4
Shipping Act, 1916, as amended, 39 Stat. 733, as amended by 75 Stat. 763 and 78 Stat. 148, Section 15 (46 U.S.C. § 814)	2, 3, 5, 7, 10, 11
Shipping Act, Section 3, 39 Stat. 729	3
Administrative Procedure Act, Section 4, 5 U.S.C. § 553, 80 Stat. 383	3
Merchant Marine Act, 1936, 49 Stat. 1985	4
Reorganization Act of 1949, 63 Stat. 203, 5 U.S.C. §§ 901-913	4
Reorganization Plan No. 21 of 1950, 15 F. R. 3178, 5 U.S.C.A., Appendix, p. 257	4
Reorganization Plan No. 7 of 1961, 26 F. R. 7315, 75 Stat. 840, effective Aug. 12, 1961, as amended by Pub. L. 848-26, Title III, § 305 (19) (Aug. 14, 1964), 78 Stat. 425, 5 U.S.C.A., Appendix, p. 348	4

Other Authorities:

Executive Order No. 6166, June 10, 1933, § 12, Note 5 U.S.C.A. § 132	4
"A New Regulatory Framework", Report On Selected Independent Regulatory Agencies, The President's Advisory Council On Executive Organization (January 1971) (The "Ash Report") pages 5, 21	8
46 C.F.R. Part 537	9

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No. ....

PACIFIC WESTBOUND CONFERENCE and
FAR EAST CONFERENCE,

Petitioners,

against

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, CARNATION COMPANY, BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS and THE PORT OF NEW YORK AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Pacific Westbound Conference and Far East Conference, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the 5th Circuit entered in this proceeding on March 19, 1971.

Opinion Below

The opinion of the Court of Appeals, reported at 440 F. 2d 1303, the court's order denying our petition for rehearing, and the decision of the Federal Maritime Commission under review are set forth in Appendix A.

Jurisdiction

The judgment of the Court of Appeals for the 5th Circuit was entered on March 19, 1971. A timely petition for rehearing was denied on April 28, 1971, and this petition was filed within ninety (90) days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350.

Questions Presented

1. May the Federal Maritime Commission, in an adjudicatory proceeding and without compliance with the requirements of the Administrative Procedure Act for rule-making, announce a new standard for the completeness of agreements to be filed with it under § 15 of the Shipping Act, 1916, as amended?

2. May the Commission, without compliance with the rule-making requirements of the Administrative Procedure Act, announce such new standard, and, consistently with Amendment V to the Constitution of the United States, give it retroactive effect so as to deprive the parties to a filed and approved agreement of their exemption from the antitrust laws and subject them to penalties provided in said § 15?

3. Did the Court of Appeals, having reversed the Commission's determination that the approved agreement between the petitioning steamship conferences did not provide for joint rate-making, err in refusing to remand the case to the Commission for redetermination whether the acts of the parties which were considered outside the scope of the approved agreement as erroneously interpreted were actually within the scope of that agreement as correctly interpreted?

Statutory Provisions Involved

Resolution of the issues requires reference to § 4 of the Administrative Procedure Act, 5 U.S.C. § 553, 80 Stat. 383, and § 15 of the Shipping Act, 1916, as amended, 39 Stat. 733, as amended by 75 Stat. 763 and 78 Stat. 148, 46 U.S.C. § 814. Because these statutory provisions are lengthy, they are set forth in Appendix B hereto.

Statement of the Case

Jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. §§ 2342, 2344, to review a final order of the Federal Maritime Commission which, in turn, has an important bearing on the ultimate resolution of *Carnation Company* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966).

In June, 1952, the ocean carriers members of the Pacific Westbound Conference[1] and members of the Far East Conference[2] entered into a joint agreement which provided for joint rate-making activities and the establishment of machinery for the implementation of a joint rate-making program. The agreement,[3] designated F.M.C. Agreement No. 8200, was promptly filed and in December, 1952, was ap-

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[1] Acting pursuant to F.M.C Agreement No. 57, originally approved in 1923, the member carriers of the Pacific Westbound Conference establish tariffs governing their rates from Pacific Coast ports to numerous destinations in the Far East.

[2] Acting pursuant to F.M.C. Agreement No. 17, originally approved in 1922, the member carriers of the Far East Conference establish tariffs of the rates which they charge for transportation from United States Atlantic and Gulf ports to most of the places in the Far East covered by the Pacific Westbound Conference.

[3] The text of the agreement is quoted in footnote 2 to the opinion of the Court below, Appendix A, p. 7a.

proved by the Commission[4] after it had been revised to comply with suggestions from the Commission's staff.

At the first joint meeting held in January, 1953, the two conferences, voting in accordance with the provisions of Agreement No. 8200, adopted a procedure for joint ratemaking during intervals between joint meetings, known as the concurrence procedure, and a procedure for exempting from the concurrence requirement cargoes moving predominantly from one coast or the other, known as the initiative procedure,[5] and a status quo with respect to the relationship between certain Pacific Westbound rates and the corresponding Far East Conference rates pending institution and completion of an economic study.

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[4] The United States Shipping Board was established by § 3 of the Shipping Act, 39 Stat. 729, to administer that Act. By Executive Order No. 6166, June 10, 1933, § 12 (set out in note under 5 U. S. C. A. § 901), the United States Shipping Board was abolished and its functions were transferred to the Department of Commerce. By the Merchant Marine Act, 1936, 49 Stat. 1985, the United States Maritime Commission was created and the functions of administering the Shipping Act were transferred to it. The functions of the United States Maritime Commission were transferred to the Federal Maritime Board, pursuant to the provisions of the Reorganization Act of 1949, 63 Stat. 203, 5 U. S. C. §§ 901-913, and Reorganization Plan No. 21 of 1950, 15 F. R. 3178, 5 U. S. C. A. Appendix, p. 257. Finally, by Part I of Reorganization Plan No. 7 of 1961, 26 F. R. 7315, 75 Stat. 840, effective Aug. 12, 1961, as amended by Pub. L. 848-26, Title III, § 305(19) (Aug. 14, 1964), 78 Stat. 425, the Federal Maritime Commission was created and to it were assigned the regulatory functions under the Shipping Act, 1916, as amended. Appendix to 5 U. S. C. A., p. 348. Herein we refer to the Commission and its predecessors as "the Commission," unless the context requires a predecessor to be named.

[5] The Conference having the initiative would not require the concurrence of the other Conference in rate changes; however, the Conference not having the initiative on an initiative item would require concurrence for any change in its rate on the item, except a change to reestablish the relationship between its rate and the rate of the Conference having the initiative.

Minutes of the first and subsequent joint meetings setting forth the actions of the conferences were promptly filed with the Commission.

From 1953 until October, 1959, the Commission gave to the conferences no intimation that it entertained any doubt that their joint activities were within the scope of approved Agreement No. 8200. To the contrary, the Chairman of the Commission, in 1953, wrote letters expressing approbation of the actions taken at the initial meeting and counseled patience for shipper interests who looked for beneficial results from those actions.

In November, 1957, the Pacific Westbound Conference voted to grant a request of Carnation Company that it roll back a $2.50 increase in the rate on canned evaporated milk from the Pacific coast to Manila. The Far East Conference did not concur in this action. Although Pacific Westbound Conference obtained the initiative on this commodity in May of 1961, thus obviating the necessity of Far East Conference concurrence, the rate was not reduced until May, 1962.

In October, 1959, the Commission instituted its Docket No. 872, an investigation to determine whether Agreement No. 8200 was the complete agreement of the parties and whether the agreement violated any of the standards of § 15 of the Shipping Act. Carnation Company and the New Orleans and New York port interests, among others, intervened in the investigation.

In December, 1962, Carnation Company instituted a treble damage antitrust suit against the conferences and their members. Recovery was sought in the United States District Court for the Northern District of California on the basis of the incident with respect to canned evaporated milk mentioned above. In *Carnation Company* v. *Pacific Westbound Conference and Far East Conference*, 383 U. S. 213 (1966), this Court, reversing a dismissal on motion,

held that the Carnation complaint stated a claim for relief, unless the acts charged in the complaint were within the coverage of an agreement approved under § 15 of the Shipping Act and, therefore, exempt from the antitrust laws. Because the Commission had, in 1965, decided its Docket No. 872, and that decision was pending review, this Court remanded the Carnation complaint to the District Court to be held in abeyance pending the final outcome of the Shipping Act proceedings, *i.e.*, F.M.C. Docket No. 872 and judicial review thereof, 383 U. S. at 224.

In 1965, the Commission decided that its approval of Agreement No. 8200 did not encompass joint rate-making by the conferences and, in fact, covered nothing but the holding of the initial meeting in 1953. In reaching its conclusion the Commission stated (8 F.M.C. at 558):

> "*Although not articulated in past cases, we are of the opinion that the applicable test here is* whether or not the agreement as filed with the Commission and as approved sets out in adequate detail the procedures and arrangements under which the concerted activity permitted by the agreement is to take place. Any interested party should be able, by a reading of the agreement, to ascertain how the agreement is to work, without resort to inquiries of the parties or an investigation by the Commission. This is not to say that we are limiting the scope of 'routine actions' which need not be the subject of section 15 filings; we are merely giving purpose to the requirements of the section. We can see no reason for the filing of agreements if they do not inform the Commission and the public in more than the barest outline as to how the agreement is to be carried out. No one reading Agreement No. 8200 could reasonably have been informed as to the procedures under which the respondent conferences were carrying out the agreement nor as to the nature of the supplementary agreements which respondents claim

> are within the contemplation of Agreement No. 8200. Thus, we hold that the supplementary agreements relating to rate-making initiative, overland rates, rate differentials, and the concurrence procedures (encompassing all instances of the operation of the concurrence machinery except for the placement of items on the agenda of the initial meeting) are without sanction in the basic Agreement No. 8200, were therefore required by section 15 of the Shipping Act, 1916, to be filed with the Commission for approval, and, not having been so filed, *were* and are being carried out in violation of the said Section 15." (Emphasis supplied)

This ruling, if unreversed, would become the predicate for treble damages under this Court's decision in *Carnation*. However, not content with the penal consequences of potential antitrust treble damages, the Government, in April of 1967, instituted a suit, predicated on the allegation of three unfiled and unapproved agreements, seeking severe § 15 penalties. *United States of America* v. *Pacific Westbound Conference and Far East Conference, et al.*, Civil No. 46840, U. S. District Court for the Northern District of California.

Thus does the Government seek to reward the petitioners, who entered into the joint agreement at Commission urging, and who kept the Commission fully informed over a period of years as to each and every action which they took in the belief that they were performing an approved agreement.

The Court below reversed the Commission's decision that Agreement No. 8200 was not a joint ratemaking agreement, but notwithstanding this drastic alteration in the characterization of the Agreement, affirmed the Commission's determination that, in relation to it, the procedures adopted by the Conferences were supplementary agreements requiring separate § 15 approvals.

Reasons for Granting the Writ

I. The case presents a question of administrative law which is very timely and important

There could scarcely be a more fitting time for the authoritative accommodation of the need for flexibility in policy determination by regulatory agencies and the right of regulated parties to be protected against burdensome or even disastrous consequences of their reliance on the continuation of a regulatory policy.[6] This problem arises not just in this case, or just in Federal Maritime Commission cases but in the activities of all of the independent agencies and Cabinet Departments which have been delegated quasi-legislative and quasi-judicial powers and duties.

Regulatory agencies have been the targets of criticism for failure to adapt to changing circumstances affecting the industries subject to their jurisdiction. See, *e.g.*, "A New Regulatory Framework", Report On Selected Independent Regulatory Agencies, The President's Advisory Council On Executive Organization (January 1971) (The "Ash Report") pages 5, 21. It is difficult to quarrel with the proposition that regulatory policy should not be static in the face of changing conditions.

However, it is grossly unfair, if not patently unconstitutional, to create retroactively, in the name of progress, causes of action for punitive damages and for civil penalties against regulated enterprises which have engaged openly in a course of conduct which they had every reason to believe was in complete conformance with contemporary statutory and administrative policy.

Change in regulatory policy should and must be by rule-making procedures in accord with the Administrative

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[6] Ultimately, of course, the public who are the patrons of regulated enterprises bear the burdens and disasters through increased charges or discontinued services.

Procedure Act operating prospectively, and not by quasi-judicial fiat operating retroactively. If a change in rules or interpretations becomes desirable in the course of an adjudicatory proceeding, the decision should, *pro tanto,* be prospective.

Here, the petitioning conferences, at the urging of the Commission, entered into an agreement which two United States Courts of Appeals have stated plainly provided for joint rate-making.[7] A year after the approval, the Commission argued to the United States Court of Appeals for the District of Columbia Circuit,[8] as it had previously to this Court,[9] that the approved rate-making agreement is in the nature of a corporate charter, general in its terms and not requiring renewed filings for authorization of activities within the broad authority conferred.

This view was rejected in the case of a *change* from a single rate system to a dual rate exclusive patronage system in *Isbrandtsen* v. *United States,* 211 F. 2d 51 (D. C. Cir. 1953), cert. denied *sub nom. Japan-Atlantic & Gulf Conference, et al.* v. *United States, et al.,* 347 U. S. 990 (1954). Although a succession of administrative decisions added to the activities considered not to be comprehended within the approval of an ordinary conference rate-making agreement, it was not until August 26, 1966—more than a year after its decision in the present case—that the Commission, by lawful rule-making, spelled out for the public and regulated parties the detail to be set forth in conference and other agreements. 46 C.F.R. Part 537.

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[7] Opinion below, and *Carnation Co.* v. *Pacific Westbound Conference,* 336 F. 2d 650, 665 (9th Cir. 1964), rev'd on other grounds, 383 U. S. 213 (1966).

[8] Brief of Federal Maritime Board in *Isbrandtsen* v. *United States, infra,* No. 11679 in the D. C. Circuit, pp. 16-21.

[9] Brief of Federal Maritime Board in *Far East Conference* v. *United States of America,* No. 15, Misc., October Term, 1951 (reported at 342 U. S. 570), pp. 13, 36-38.

Our grievance is that in our case the Commission announced the lineal ancestor of 46 C.F.R. Part 537, and stated candidly that it was "not articulated in past cases"; but, nevertheless, not only ordered the conferences to cease and desist from carrying out the procedures which, under the new interpretation, require separate filing and approval, but also specifically held that these procedures "not having been so filed, were and are being carried out in violation of the said section 15".

With the current increasing emphasis upon the necessity for administrative responsiveness to changed conditions, it is essential for the orderly conduct of regulated enterprises that there be an authoritative decision of this Court that changes in administrative policy and statutory interpretations must follow the route of rule-making and be prospective in their operation and not deprive regulated parties of the rights and immunities which their actions enjoyed at the time when they were taken.

II. The decision below is inconsistent with a decision of this Court with respect to review of F.M.C. decisions

The court below reversed the Commission, as a matter of law, insofar as the Commission held that Agreement No. 8200 did not authorize joint ratemaking. It nevertheless allowed to stand the Commission's holding that the concurrence, initiative, and overland-status-quo arrangements were not authorized by the approval of Agreement No. 8200, but were "supplementary" agreements requiring separate § 15 approvals.

In so doing, the court exercised its own judgment as to the relationship between the so-called supplementary arrangements and an approved agreement for joint ratemaking. The Commission never addressed itself to that

issue since it held no joint-ratemaking was authorized by agreement 8200. It is the Commission's judgment which should be applied to this issue in the first instance.[10]

In *Consolo* v. *Federal Maritime Comm'n*, 383 U. S. 607, 618-619 (1966), this Court held that the Court of Appeals for the District of Columbia Circuit had applied a standard of review "not consistent with that provided by the Administrative Procedure Act" in reversing a Commission determination on the ground "of the substantial evidence showing that [the reparations] would be inequitable." In the present case, the Court of Appeals for the Fifth Circuit went beyond the error found in *Consolo*. After giving to Agreement No. 8200 a much broader significance than the Commission had done,[11] the court went on to decide for itself the issue which this Court said, in *Carnation* (383 U. S. at 224), was to be resolved by the Commission subject, of course, to proper judicial review.

In *Consolo*, this Court, having determined that the Court of Appeals had applied an improper standard of review in *reversing* the Commission, felt that it was unnecessary to remand the case to the Court of Appeals for further consideration on the basis of a proper standard. This was so because the administrative record was found by this Court to contain substantial evidence to support the Commission's conclusion (383 U. S. at 621-626).

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[10] Our petition for rehearing suggested remand to the Commission. The Government opposed, claiming that the reversal on the interpretation of the Agreement would not affect the question whether the supplementary arrangements were within the scope of the approval of the Agreement. The briefs of the Government, of course, are not equivalent to a decision of the Commission rendered after an opportunity for the Conferences to be heard.

[11] In this regard, the Court of Appeals was performing its function properly. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922), reaffirmed in *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 69 (1956).

In the present case, the same theory is unavailable as the basis for the Court of Appeals' affirmance of the Commission's ultimate conclusion. The holding that Agreement No. 8200, contrary to the Commission's view, authorized joint ratemaking, destroyed the major premise for the Commission's holding that approval of the Agreement did not encompass approval of the activities termed supplementary. Only a Commission reconsideration in the light of a proper interpretation of Agreement No. 8200 can provide the answer to the issue underlying the *Carnation* case and the § 15 penalty case.

III. The decision below is inconsistent with a recent decision of the same court with respect to activities authorized by an approved ratemaking agreement

In *Overland and OCP Rates and Absorptions*, 12 F.M.C. 184 (1969), the Commission held that ordinary conference agreements, providing simply for ratemaking, authorized the adoption by certain conferences of dual tariffs, one containing rates applicable to cargo originating at or destined to local territory (U. S. Western States), and the other containing lower rates applicable to cargo originating at or destined to interior U. S. points. Also held to be covered by the ratemaking provisions of the conference agreements were the arrangements with inland carriers, including sharing of costs of interchange between land and ocean carriers. The Commission reached this conclusion *after* it had announced, in the case which is the subject of this petition, the new standard for the completeness of § 15 agreements.

The Commission reasoned in the *Overland* case that the agreements, consistently with the standards contemporaneous with their approval, covered the implementation of lawful systems of rates known to the Commission at

the time of the approvals. It ordered the conferences to file language to "update" their agreements to conform to the new standards, but specifically ruled that § 15 had not been violated by past conduct. 12 F.M.C. at 207-209.

That decision was affirmed in *Port of New York Authority* v. *Federal Maritime Comm'n.*, 429 F. 2d 663 (5th Cir. 1970), cert. denied, —— U. S. ——, 27 L. Ed. 2d 806 (No. 912, October Term, 1970, Feb. 22, 1971, 39 U. S. Law Week, 3358). The court said (429 F. 2d at 667-668):

> "It is true that the absorption agreements having to do with terminal costs were worked out jointly between the conferences and the railroads and that the Commission has jurisdiction only over common carriers by water. This, however, in no way detracts from the finding that *the absorption agreements were routine and within the contemplation of the agreements of the conferences as approved by the Commission.* The record supports the conclusion that the absorption agreements were incidental to rate making which, in turn, was based upon normal economic factors such as cost and competition." (Emphasis supplied.)

In its opinion in the present case, the court below accepted the distinction which the Commission drew in the *Overland* case between the facts there involved and those involved in the present case. In so doing, it overlooked the fact that the Commission emphasized that in the *Overland* case it was dealing with ratemaking agreements whereas in the present case it was not. Having held contrary to the Commission that the agreement here under consideration was, in fact, a ratemaking agreement, the court, consistently with its decision in the *Overland* case, should have remanded the proceeding to the Commission for further consideration on the basis of a proper interpretation of Agreement No. 8200.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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July 23, 1971

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23506

PACIFIC WESTBOUND CONFERENCE,
and FAR EAST CONFERENCE,
Petitioners,

versus

FEDERAL MARITIME COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, THE PORT OF NEW YORK AUTHORITY, et al.,
Intervenors.

Petition for Review of an Order of the Federal Maritime Commission (Louisiana Case)

(March 19, 1971)

Before THORNBERRY, GOLDBERG and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: This petition for review of the report and orders of the Federal Maritime

Commission in a case of substantial importance involving ocean freight rates, was filed by Pacific Westbound Conference and Far East Conference, two major conferences or associations of common carrier shipping companies engaged in transporting cargo between ports in the United States and the Far East.[1] The question presented by petitioners is whether we should reverse the Commission and permanently enjoin its decision. We are asked to hold that the two conferences were authorized to act jointly in fixing ocean freight rates under the provisions of an agreement previously approved by the Commission, and then to find that certain supplementary agreements made thereafter were authorized under the Commission's approval of the basic agreement. The Ports of New York and New Orleans, and the Carnation Company, a shipper, have intervened.

The case is directly related to another petition for review filed contemporaneously by the Ports of New York and New Orleans to portions of the same Federal Maritime Commission report and orders. We have decided that case today by separate opinion.

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[1]Jurisdiction to review in this case was invoked pursuant to Section 2 of the Judicial Review Act of 1950 (5 U.S.C. § 1032). That Act, now repealed, is replaced by substantially the same revisions in 28 U.S.C. §§ 2341-52, especially Section 2342(3) thereof.

The petition was originally filed in the United States Court of Appeals for the Ninth Circuit but transferred to this Court on motion of the Federal Maritime Commission (see 28 U.S.C. § 2112(a)) because of the earlier filing of the contemporaneous petition of the Ports in No. 23209.

Appendix A

PAC. WESTBOUND CONF. v. F.M.C. & U.S.A. 3

The proceedings began with an order by the Federal Maritime Board (now Commission) dated October 26, 1959 in Docket No. 872, entitled *Joint Agreement Between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference.* On the Board's own motion an investigation was instituted into Agreement No. 8200, a joint agreement relating to ocean freight rates between the member lines of the Far East Conference (FEC) and Pacific Westbound Conference (PWC), which agreement had been previously approved by the Board pursuant to Section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). The Board sought to determine whether Agreement No. 8200 was a complete agreement within the meaning of Section 15, and whether it was being carried out in accordance with the Shipping Act, 1916, as amended (46 U.S.C. §§ 801-842 (1964 ed.)). The two conferences, FEC and PWC, were made respondents by the Board.

A brief history of the two conferences is necessary and helpful to an understanding of our decision in this case. Pacific Westbound Conference, a conference or association of ocean carriers operating from Pacific Coast United States ports to the Far East, is an approved conference pursuant to Agreement No. 57 which was filed and approved by the Commission under Section 15 of the Act effective on January 1, 1923. The Far East Conference is a similar conference of ocean carriers operating from Atlantic and Gulf Ports of the United States to the Far East and its agreement was originally approved under Section 15 of the Act as A-

greement No. 17 by the Commission under provisions of Section 15 on November 14, 1922.

Later, these two conferences, which are separate associations and highly competitive to each other in the United States-Far East trade, entered into a joint conference agreement affecting ocean shipping rates, Agreement No. 80, which received Commission approval under Section 15 in August 1925. The agreement lasted five years, and was dissolved by the conferences effective December 15, 1930. Economic and competitive warfare between the conferences resulted and a member of the Commission and staff employees of the Commission urged renewal of a joint agreement between them to end the destructive rate war between carriers. Accordingly, the conferences again entered into a joint agreement designed to restore stability of ocean rates, Agreement No. 8200, which was approved by the Commission under Section 15 of the Act on December 29, 1952.

The Commission's investigation disclosed, however, that there were supplementary agreements in force between PWC and FEC pursuant to Agreement No. 8200, "affecting overland rates, the concurrence procedures, and the placement of items on the initiative list," which had never been filed with or approved by the Commission under Section 15. PWC and FEC were directed by the Commission's order of July 28, 1965 to cease and desist from carrying out the supplementary agreements until filed or approved by the Commission, as required by Section 15.

Appendix A

PAC. WESTBOUND CONF. v. F.M.C. & U.S.A. 5

The Commission in its report (8 F.M.C. 553) found that Agreement No. 8200 was "nothing more than evidence of the general intention of the parties to enter into concerted ratemaking. It sets out no details, no procedures, with the exception of the procedures to be taken at the initial meeting, nor does it inform any interested person as to how the agreement is to work." Id. at 558. The Commission held that the supplementary agreements relating to ratemaking initiative, overland rates, rate differentials, and the concurrence procedures for placement of items on the initiative list were without sanction and that under the basic Agreement No. 8200, Section 15 filing and approval were required. The Commission held, therefore, that use of the supplementary agreements without prior approval was a violation of that section of the Act. In the order on petition for clarification dated November 1, 1965, the Commission significantly added to its July 28, 1965 report the further finding that "... there exists no *approved* agreement which permits joint rate action between PWC and FEC." (Emphasis by the Commission.)

Petitioners PWC and FEC seek reversal of the Commission's holding that its approval of Agreement No. 8200 did not permit joint rate action between the two conferences, which finding is alleged to be manifestly erroneous and also contrary to the plain meaning of the agreement. They also ask that we hold that the supplementary agreements were lawful under the basic agreement. They request that we suspend and enjoin the enforcement of the Commission's report and

orders insofar as they prevent petitioners from acting jointly in fixing ocean rates.

In the meanwhile, Carnation Company, an intervenor in the Commission proceeding, filed a treble damage antitrust suit under the Sherman and Clayton Acts (15 U.S.C. §§ 1-2, 15 U.S.C. § 15) against PWC and FEC in the United States District Court for the Northern Division of California, in connection with the fixing of rates for the transportation of evaporated milk to the Far East which had been carried out under the procedures provided for in the supplementary agreements between the two conferences. Carnation Company contended that the rates charged for transportation of its cargo, having been implemented under the unapproved supplementary agreements, were unlawful per se under the antitrust laws. The Supreme Court, reversing the Ninth Circuit which had sustained the District Court's granting of a motion to dismiss (336 F. 2d 650 (1964)), held that the Shipping Act, 1916, gave the shipping industry only a limited antitrust exemption. Respondent Pacific Westbound Conference's contention that the Act had repealed all antitrust regulations concerning the ratemaking activities of the shipping industry was rejected. The Supreme Court remanded the case to the District Court "with instructions to stay the action pending the final outcome of the Shipping Act proceedings [in Docket No. 872] and then to proceed in a manner consistent with this opinion." *Carnation Co. v. Pacific Westbound Conf.*, 383 U. S. 213, 224, 86 S. Ct. 781, 788 (1966). Carnation's claim, therefore, awaits the outcome of the appeal in the present case.

There are, of course, conflicting views about the import of Agreement No. 8200.[2] The Commission held

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[2]The text of Agreement No. 8200 is of critical importance and is, therefore, reproduced in full as follows:

Federal Maritime Board

Agreement No. 8200

Far East Conference and Pacific Westbound Conference.

Agreement made in the City of New York this fifth day of November, 1952, by and between the parties who shall execute this Agreement at the foot hereof under the caption "Members of the Pacific Westbound Conference", who are hereinafter sometimes collectively referred to as the Pacific Lines, and the parties who shall execute this Agreement at the foot hereof under the caption "Members of the Far East Conference", who are hereinafter sometimes collectively referred to as the Atlantic/Gulf Lines.

Witnesseth:

1. The Pacific Lines are parties to an agreement which has been designated Federal Maritime Board Agreement No. 57, as amended, which designates the parties thereto as the Pacific Westbound Conference and whenever reference is hereinafter made to action which is required or permitted to be taken by the Pacific Lines, such reference is intended to refer to action such as is required to effect the establishment or change of rates pursuant to said Agreement No. 57, as amended.

2. The Atlantic/Gulf Lines are parties to an agreement which has been designated Federal Maritime Board Agreement No. 17, as amended, which designates the parties thereto as the Far East Conference; and whenever reference is hereinafter made to action which is required or permitted to be taken by the Atlantic/Gulf Lines, such reference is intended to refer to action such as is required to effect the establishment or change of rates pursuant to said Agreement No. 17, as amended.

3. The Pacific Lines operate vessels as common carriers of cargo from Pacific Coast ports of the United States and Pacific Coast ports of Canada to certain ports in the Far East; and the Atlantic/Gulf Lines operates vessels as common carriers of cargo

from United States Atlantic and Gulf ports to some of the same ports in the Far East; and action taken hereunder shall apply to transportation of cargoes to all destinations which shall, from time to time, be common to the scope of both Agreements 57 and 17.

4. *The purpose which the parties desire to accomplish hereby (which is hereinafter sometimes for brevity referred to as "the purpose of this agreement") is to assure to the parties hereto, as well as to the manufacturers, merchants, farmers and labor, whose products are exported from the United States to Far East destinations which may, from time to time, be common to the scope of both said Agreements 57 and 17, stability of ocean rates and frequency, regularity and dependability of service which is essential to their continued prosperity; and for the accomplishment of the purpose of this agreement it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates,* except for the following commodities when shipped in bulk:

Coal, Coke, Phosphate Rock, Salt, Ores, Wheat, Barley, Rice, Corn, Soybeans, Oats, Rye;

which expected commodities are not included within the scope of this agreement.

Now, Therefore, in consideration of the premises and of the mutual undertakings of the parties hereto, it is hereby agreed as follow:

First: As promptly as possible after the approval of this agreement by the Federal Maritime Board, the parties shall hold a meeting which is hereinafter referred to as the "initial meeting". The initial meeting shall be held at a time and place to be mutually agreed upon by the parties hereto. If, however, prior to the 30th day after such approval the parties hereto shall not so have mutually agreed upon the time and place for the holding of the initial meeting said initial meeting shall be held on the 40th day after such approval at the Fairmont Hotel in the City of San Francisco, California; and if such 40th day shall fall on a Saturday, Sunday or legal holiday, said meeting shall be held on the second business day thereafter, at the same place. Such meeting shall be attended by representatives of the Pacific Lines and of the Atlantic/Gulf Lines. All matters coming before the initial

meeting for consideration and action shall be determined only by a concurrence of the Pacific Lines, acting as a group, and of the Atlantic/Gulf Lines, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates. *The initial meeting shall make rules, not inconsistent with the provisions of this agreement, for the conduct of all meetings to be held hereunder, and for the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting.*

Second: Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, *if either group of Lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof*, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram, or 72 hours after the giving of such notice if given by air mail, and a summary of the facts which justify the changes on said short notice. Forty-eight hours, or 72 hours, after the giving of such notice, dependent upon the medium by which such notice shall have been given, the notifying group may make such changes as stated in said notice and the other group may, at the end of 48 hours, or at the end of 72 hours, as the case may be, after the giving of such notice, make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or violation of this agreement. *The parties shall, however, promptly give to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, copies of any notices and information with respect to any changes in tariffs given or made as provided for in this Article Second.*

Third: The parties hereto shall, promptly after the adjournment of the initial meeting and of each subsequent meeting, file with the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, a record of all busi-

ness transacted at said respective meeting.

Fourth: Neither the Pacific Lines nor the Atlantic/Gulf Lines shall admit new parties to their Conference Agreement unless such parties shall simultaneously become parties to this agreement by affixing their signatures under the appropriate caption or captions at the foot of this agreement or a counterpart thereof. Whenever any party hereto shall have ceased to be a party to Agreement No. 57 as amended, or a party to Agreement No. 17 as amended, or a party to both of said agreements, as the case may be, such party by such cessation shall cease also to be a party to this agreement; but so long as such party shall continue to be a party to either said Agreement No. 57 as amended, or Agreement No. 17 as amended, it shall also continue to be a party to this agreement. Prompt notice of the change of parties hereto shall be given by each group to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended.

Fifth: Any notice required or permitted hereby to be given shall be given by telegram if telegraphic communication is available, otherwise by air mail, and if given to the Pacific Lines shall be addressed to the Secretary-Manager of the Pacific Westbound Conference at San Francisco, California, and if given to the Atlantic/Gulf Lines shall be addressed to the Chairman of the Far East Conference, 11 Broadway, New York 4, New York. The deposit of any such notice air mail, postage prepaid, in a United States Post Office letter box, or the deposit of any such telegram in an office of any telegraphic company, as the case may be, shall constitute the giving of such notice. Each of the groups of lines may, from time to time, change the address to which notices to it are to be dispatched by notice given to the other group.

Sixth: *This agreement shall become effective when, but not until, the same shall have been approved by the Federal Maritime Board, pursuant to the provisions of Section 15, Shipping Act, 1916, as amended.*

Seventh: Each Line, a party hereto, shall bear the expenses of its own representatives while attending any meetings held under the provisions hereof. The expenses of hiring the places where the meetings shall be held and such expenses incidental thereto as may be for the joint benefit of all of the parties here-

that Agreement No. 8200 merely provided the basis for an initial meeting of the two conferences at which rules for the conduct of meetings and transaction of business and machinery for change of rates, rules or regulations would be established — in effect, that it was a general intention or agreement to enter into an agreement. The Commission further held that its approval of the agreement did not constitute an approval of joint ratemaking between the two conferences, though paradoxically it found "insufficient evidence to disapprove Agreement No. 8200." On the other hand, PWC and FEC contend that the agreement expressly provided for and clearly contemplated joint conference ratemaking and that the supplementary agreements were necessary implementations of the approved agreement; that to determine more than eleven years after approving Agreement No. 8200 that there is no authority for joint rate action is in effect to revoke

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to, shall be borne to the extent of one half thereof by the Pacific Lines as a group and one half thereof by the Atlantic/Gulf Lines as a group.

Eighth: *This agreement shall continue in effect for a period of nine months and shall continue thereafter* until the ninetieth day after any one or more of the Lines, a party or parties hereto, shall have given to the Pacific Lines and to the Atlantic/Gulf Lines and to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, notice of termination; and on said ninetieth day this agreement shall terminate and come to an end.

In Witness Whereof, the parties hereto have caused this agreement to be executed by their respective officers or representatives and duly authorized as of the day and year hereinabove first written. (Emphasis by the Court.)

* * * *

substantive rights already conferred by the initial Section 15 approval of the joint agreement and thereby subject the conferences to unjust and unfair treble damage suits by shippers under the federal antitrust statutes. Among other things, they point to the fact that the Commission urged that they enter into a joint ratemaking agreement, to the informal prior approval of the text of the agreement by the Regulation Office staff, to the notice in the Federal Register of the filing of Agreement No. 8200 which stated that the agreement provided for the establishment by joint action of the rates to be charged, and to the antecedent joint ratemaking agreement between the conferences (Agreement No. 80) made under Commission approval. They state that for many years thereafter, until the present decision, the Commission recognized that the agreement provided for joint ratemaking.

Carnation Company argues that Agreement No. 8200 "admittedly permits some interchange between PWC and FEC on matters of common concern," but that there is no provision authorizing joint ratemaking; and, further, they contend that the Supreme Court called the agreement only an "agreement for consultation." *Carnation Company v. PWC*, 383 U. S. 213, 223, n. 6, 86 S. Ct. 781, 787, n. 6 (1966). Carnation asserts that the supplementary agreements to Agreement No. 8200 were entered into somewhat later than the original agreement, and that a reading of Agreement No. 8200 would not inform the public or a shipper that such supplementary agreements were contemplated or would be made.

The Ports contend that the Commission's decision in Docket No. 872 is irreconcilable with the Commission's later decision in the overland rate case, Docket No. 65-31, affirmed by this Court in *Port of New York Authority v. Federal Maritime Commission*, 5 Cir., 1970, 429 F. 2d 663, cert. denied, ____ U. S. ____, ____ S. Ct. ____ (1971). They reiterate their contention that this Court erred in affirming the Commissioner's report and order in *Port of New York Authority* supra.

There is no mention in Agreement No. 8200 of the initiative and concurrence procedures of the two conferences which were the subject of supplementary agreements.[3] They were not agreed to until May 1955 and May 1956 following approval of Agreement No. 8200 by the Commission in 1952.[4] The effect of the initiative and concurrence procedures is to give to each

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[3]Agreement No. 8200 does contain a passing reference to concurrence procedure in Paragraph First, the pertinent provision reading as follow:

> "All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the Pacific Lines, acting as a group, and of the Atlantic/Gulf Lines, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates."

[4]The May 1955 agreement was as follows:

> "The Conference having the rate-making initiative on a commodity may not change the rate basis, terms and conditions, or open or close the rate of that commodity without concurrence from the other Conference."

The May 1956 agreement was as follows:

> "Authority to establish rate-making initiative on commodities, pursuant to the formula defined in the preceding paragraph, may only be granted to the Conference desiring such initiative after concurrence by the other Conference."

conference veto power over the rates of the other. In our view the supplementary agreements were not routine ratemaking such as occurs between members within a single conference. Interstitial, day by day, adjustments of administrative details and tariff charges, within a conference between its members may be considered mere routine matters not requiring Section 15 approval. Here, however, there were significant agreements between two competitive conferences relative to ratemaking, conferring to each the power of veto over the rates of the other. As we have already pointed out, none of the supplementary agreements was filed with the Commission for approval.

We hold, therefore, that the supplementary agreements were not contemplated by the plain language of Agreement No. 8200 and that they could not be lawfully entered into without prior Section 15 filing and approval of the Commission. Here the Commission's duty was to "scrutinize the agreement[s] to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute." *Isbrandtsen Co., Inc. v. U. S.*, D. C. Cir., 1954, 211 F. 2d 51, 57, cert. denied sub nom., *Japan-Atlantic and Gulf Conf. v. United States*, 347 U. S. 990, 74 S. Ct. 852 (1954). In addition, the subsequent agreements unlawfully affect the organic conference agreements of PWC Agreement No. 17 and FEC Agreement No. 57 since these conferences, whose power to fix rates among the members of each conference respectively, was approved by the Commission, but who may not do so under the supplementary agreements

because of the initiative and concurrence procedures agreed to by PWC and FEC.

The Commission was not estopped as a matter of law by the knowledge alleged to be had by the Commission and its staff concerning the manner in which the two conferences operated under Agreement No. 8200 and the supplementary agreements. See *H. Kempner v. Fed. Maritime Com.*, D. C. Cir., 1963, 313 F. 2d 586, 587, cert. denied sub nom., *Gulf/Mediterranean Ports Conf. v. Fed. Mar. Com.*, 375 U. S. 813, 84 S. Ct. 42 (1963).[5] It is, of course, not contended that the supplementary agreements were submitted either formally or informally to the Commission for approval. The information which the Commission received about the operations of the conference under Agreement No. 8200 was somewhat abbreviated, and the public and the Commission were not informed of the manner in which these supplementary agreements were being carried out. The conference minutes indicate that the meetings were confidential, that each conference member was required to respect this confidence, and that unauthorized disclosure to shippers regarding rate changes and the position of an individual conference or any member thereof was contrary to the spirit of the joint agreement.[6] It was not known that each con-

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[5] In *Kempner*, the Court held that certain discriminatory dual rates were not approved by the regulatory agency merely because it was silent concerning them, and that the rates were, therefore, illegal.

[6] The conferences' minutes of Joint Meeting No. 1 — January 1953:

"(a) The proceedings of meetings are confidential and both Conferences and every Member are duty

ference had veto power over the rates of the other. As the Commission later said in the Overland Rate case of this practice (with which we concur), "a system of 'concurrences' and 'initiative items' under which one conference in effect surrendered its right even to initiate consideration of certain rate changes without the prior concurrence of the other ... was hardly within the contemplation of ordinary ratemaking procedure." Investigation of Overland/OCP Rates & Absorptions, 12 F.M.C. 184, 213 (1969). We have no difficulty, therefore, in finding that the supplementary agreements were not incidental to or implementation of the basic conference agreement, and were certainly not routine as that term is described in Ex Parte 4, Section 15 Inquiry, 1 U.S.S.B. 121, 125, or as such agreements are referred to in *Isbrandtsen Co., Inc. v. U. S.*, D. C. Cir., 1954, 211 F. 2d 51, 56, cert. denied sub nom., *Japan-Atlantic and Gulf Conf. v. United States*, 347 U. S. 990, 74 U. S. 851 (1954).[7] See also *A-*

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bound to respect this confidence and no information in regard to changes in rates, practices, etc., or positions taken are to be disclosed unless authorized by joint Conference action."

Minutes of Joint Meeting No. 3 — September 1954 further provide:

"(c) It is the understanding of both Conferences that unauthorized disclosure to shippers of information regarding rate changes and/or the position of an individual Conference or any Member thereof, regarding rate requests in [sic] contrary to the spirit of the Joint Agreement."

[7] In *Isbrandtsen*, the D. C. Circuit held that under Section 15 of the Act, a scheme of dual rates involved an agreement, or at least a modification of an existing basic agreement which "can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and dis-

merican Export & Isbrandtsen Lines v. F.M.C., 9 Cir., 1964, 334 F. 2d 185, where the Court sustained the Commission in its holding that a port equalization agreement between conference members was not within the scope of the basic conference agreement. Cf. *Empire State Highway Trans. Assn. v. Fed. Maritime Board*, D. C. Cir., 1961, 291 F. 2d 336, cert. denied, 368 U. S. 931, 82 S. Ct. 360 (1961).

We are in disagreement, however, with the Commission holding that Agreement No. 8200 did not permit joint ratemaking between PWC and FEC. We find that the facts and circumstances overwhelmingly support a holding that the agreement which was expressly approved by the Commission did authorize joint ratemaking.[8] The following is a summary of the salient par-

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crimination not embodied in the basic agreement." Separate Commission approval was, therefore, necessary.

[8] An interesting observation in this connection (with which we agree) is made by PWC counsel in opening brief filed January 12, 1967, as follows:

> "The 'supplementary' agreements, which, according to the Commission, departed from and amended this authority have nothing to do with the joint rate authority itself, which was contained in the Joint Agreement. This right to agree on rates to be charged was the whole purpose of the Agreement; it was what the Board members had urged on the parties; it was the core of the Board's description of the Joint Agreement in its public notice thereof; it was the authority for joint action that the parties took for years with the full knowledge of the Board; it was a right that members of the Board and its staff continued to state publicly was provided in the Joint Agreement." (P. 35.)

ticulars which uphold our conclusion:

(1) The background history shows that the two conferences admittedly had an antecedent joint ratemaking agreement (Agreement No. 80), approved by the Commission, which subsisted for a five-year period;

(2) After that agreement was dissolved and competitive rate warfare ensued between the conferences, they were urged by a member of the Commission and staff members in the Regulation Office to renew the agreement;

(3) Thereafter, the proposed new joint conference agreement was prepared and submitted informally for review and opinion to the Regulation Office to determine if it would be recommended; the informal comments of the Regulation Office were then contained in a new draft which became Agreement No. 8200;

(4) The Federal Register notice published by the Commission relative to Agreement No. 8200 gave twenty days' notice to interested parties to file approval or disapproval, and specifically referred to the provision relative to the contemplated establishment "by joint rate action of the rates to be charged" between the two conferences;

(5) Agreement No. 8200 was approved under Section 15 by the Commission which must have considered it a complete agreement on its face or it would not have approved it;

(6) Agreement No. 8200 cannot properly be considered merely an intention to make a subsequent agreement, for if so, Section 15 approval which was granted by the Commission would not have been required, since an agreement to agree "does not constitute such an agreement" and approval is necessary "only when a final agreement had been concluded." See Transshipment and Apportionment Agreements from Indonesian Ports to U. S. Atlantic and Gulf Ports, 10 F.M.C. 183, 196 (1966); see also Transshipment and Through Billing Arrangement Between East Coast Ports of South Thailand and U. S. Atlantic and Gulf Ports, 10 F.M.C. 201, 215 (1966).

(7) Joint ratemaking by the two conferences continued for more than a decade under Agreement No. 8200 and rate stability was restored in the United States-Far East trade;

(8) The Ninth Circuit in *Carnation Co. v. PWC*, 336 F. 2d 650, 665 (1964), though reversed on other grounds by the Supreme Court, held that Agreement No. 8200 provided for joint ratemaking between the two conferences in a detailed, well-reasoned discussion, with which we concur;[9]

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[9]Judge Pope for the Court said:

> "This calls for a reference to Agreement No. 8200 which was made a part of the record before the district court. We have noted that it expressly provided for and obviously contemplated the establishment of rates by agreements between both conferences. This approved agreement expressly provided that rates should be determined only by a concurrence of the two conferences each acting as a group and in accordance with the procedures prescribed by its con-

(9) Though it is arguable that Agreement No. 8200 is ambiguous insofar as whether it provided for joint ratemaking, we conclude that a fair reading of the entire instrument requires a finding that it obviously contemplated joint rate action between PWC and FEC. The plain language of the agreement unmistakably shows that the parties were entering into a joint ratemaking procedure. For example, in Witnesseth, Par. 4 of the Agreement, we find the following: "The purpose which the parties desire to accomplish hereby ... is to assure to the parties hereto, as well as to the manufacturers, merchants, farmers and labor, whose products are exported from the United States to Far East destinations which may, from time to time, be common to the scope of both said Agreements 57 and 17, stability of ocean rates and frequency, regularity and dependability of service which is essential to their continued prosperity; and for the accomplishment of the purpose of this agreement it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates ...."

Paragraph First of the Agreement expressly provided for a first or "initial meeting" which "shall make rules, not inconsistent with the provisions of this agreement, for the conduct of all meetings to be held hereunder, and for the transaction of such other business as the parties may be permitted to conduct by

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ference agreement with respect to the establishment or change of rates."

virtue hereof, including the provision of the machinery for the *change of any rates, rules or regulations* adopted at the initial meeting or at any subsequent meeting." (Emphasis by the Court.)

There are other provisions in the Agreement which clearly disclose the nature and character of the written instrument as one providing for joint ratemaking between the two conferences.

(10) The Commission has the necessary procedures available to dissolve Agreement No. 8200 if it considers it no longer proper, and this course of action is much preferable to reaching an equivalent result by a faulty and erroneous interpretation of the agreement and a declaration that it never provided for joint rate action.

Our conclusion, therefore, is that the Commission erred in holding that Agreement No. 8200 did not permit joint ratemaking between PWC and FEC, but we agree with the Commission that the supplementary agreements are without sanction and require Section 15 approval; in all other respects the Commission's report and orders in Docket No. 872 are correct and should be affirmed.

AFFIRMED IN PART, REVERSED IN PART.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 23506

PACIFIC WESTBOUND CONFERENCE and
FAR EAST CONFERENCE,

Petitioners,

versus

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS,
THE PORT OF NEW YORK AUTHORITY, et al.,

Intervenors.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION (LOUISIANA CASE).

Before THORNBERRY, GOLDBERG and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Pacific Westbound Conference and Far East Conference for

review of an order of the Federal Maritime Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Federal Maritime Commission in this cause be, and the same is hereby affirmed in part; and reversed in part; in accordance with the opinion of this Court;

It is further ordered that petitioners be condemned to pay one-half of the costs on appeal to be taxed by the Clerk of this Court; respondents be condemned to pay one-fourth the costs; and intervenors be condemned to pay one-fourth of said costs.

March 19, 1971.

Issued as Mandate:

Order Denying Petition for Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23506

PACIFIC WESTBOUND CONFERENCE and
FAR EAST CONFERENCE,

Petitioners,

versus

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS,
THE PORT OF NEW YORK AUTHORITY, et al.,

Intervenors.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION (LOUISIANA CASE).

(April 28, 1971)

ON PETITION FOR REHEARING

Before THORNBERRY, GOLDBERG and AINSWORTH,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Appendix A

FEDERAL MARITIME COMMISSION

No. 872

JOINT AGREEMENT BETWEEN MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

Decided July 28, 1965

Supplementary agreements affecting overland rates, concurrence procedures, and the placement of items on the initiative list held to constitute unapproved agreements which are required to be filed with the Commission for approval, pursuant to Section 15 of the Shipping Act, 1916.

Doctrine of administrative estoppel held to be inapplicable in this case, as regards "tacit approval" of the supplementary agreements.

Right of independent action held preserved by Agreement No. 8200 and neither respondent found to have surrendered such right by means of a secret agreement.

Past conduct by respondents in regard to their treatment of Carnation Company held to violate Section 16, Shipping Act, 1916.

Evidence in the record of this proceeding held insufficient to warrant disapproval of Agreement No. 8200.

Respondents ordered to cease and desist from carrying out their supplementary agreements until filed with and approved by the Commission.

Elkan Turk, Jr., for the Far East Conference.

Allan E. Charles, for the Pacific Westbound Conference.

Mark P. Schlefer, for Alabama State Docks, Port of Galveston, and Port of Houston.

James M. Henderson, for Port of New York Authority and North Atlantic Ports Association.

A. P. Davis, for Carnation Company.

Louis A. Schwartz, for New Orleans Traffic and Transportation Bureau.

Richard S. Harsh, Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*):[1]

[1] Commissioner George H. Hearn did not participate.

Appendix A

This matter is before us on exceptions to the Initial Decision of Chief Examiner Gus O. Basham.

The Federal Maritime Board, our predecessor, instituted this investigation on its own motion on October 26, 1959, in order to determine whether Agreement No. 8200 between the member lines of the Far East Conference and the member lines of the Pacific Westbound Conference is a true and complete agreement between the parties; whether Agreement No. 8200 is being carried out in a manner which makes the agreement unjustly discriminatory or unfair as between carriers, shippers, exporters or ports, or between exporters from the United States and their foreign competitors; and whether the Agreement operates to the detriment to the commerce of the United States or violates the Shipping Act, 1916.

Agreement No. 8200 was signed on November 5, 1952, and was approved by the Federal Maritime Board pursuant to section 15 of the Shipping Act, 1916, on December 29, 1952. By the terms of the agreement, the parties thereto agree to establish from time to time "rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates," excepting rates on 12 specified commodities. The agreement further stipulates the procedures for subsequent meetings or interconference interchanges of information to accomplish the objectives of the agreement.

Previous to the signing of the agreement, a meeting was held on January 16, 1952, attended by the Chairman of the Far East Conference, the Secretary-Manager of the Pacific Westbound Conference, a member of the Federal Maritime Board and two staff employees of the Board. At this meeting the Board member told the group "that he was very much interested in seeing the two Conferences form a joint agreement and that he hoped it could be finalized without delay." One of the staff members said he "and at least one member of the Board would like to see a joint agreement put into effect. . . ."

A draft agreement was prepared and personally delivered on September 4, 1952, by Far East's Chairman to the Board's staff, with a request "for an informal review of the agreement and opinion as to whether it would be recommended" by the Regulations Office for approval. The Regulations Office on September 18, 1952, sent Far East written informal comments on the draft. Another revised draft was prepared and made final by execution by the parties on November 5, 1952. On the same date a copy of the executed agreement was transmitted to the Board with a request for approval under section 15 of the Act, and approval followed on December 29, 1952.

The first two articles of the agreement provide for an "initial meeting" and for "independent action" on rate charges, as follows:

Appendix A

First: As promptly as possible after the approval of this agreement by the Federal Maritime Board, the parties shall hold a meeting which is hereinafter referred to as the "initial meeting." The initial meeting shall be held at a time and place to be mutually agreed upon by the parties hereto. If, however, prior to the 30th day after such approval the parties hereto shall not so have mutually agreed upon the time and place for the holding of the initial meeting, said initial meeting shall be held on the 40th day after such approval at the Fairmont Hotel in the city of San Francisco, Calif.; and if such 40th day shall fall on a Saturday, Sunday or legal holiday, said meeting shall be held on the second business day thereafter, at the same place. Such meeting shall be attended by representatives of the PACIFIC LINES and of the ATLANTIC GULF LINES. All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the PACIFIC LINES, acting as a group, and of the ATLANTIC/GULF LINES, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates. The initial meeting shall make rules, not inconsistent with the provisions of this agreement, for the conduct of all meetings to be held hereunder, and for the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting.

Second: Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by airmail, and a summary of the facts which justify the changes on said short notice. Forty-eight hours, or 72 hours, after the giving of such notice, dependent upon the medium by which such notice shall have been given, the notifying group may make such changes as stated in said notice and the other group may, at the end of 48 hours, or at the end of 72 hours, as the case may be, after the giving of such notice, make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or violation of this agreement. The parties shall, however, promptly give to the governmental agency charged with the administration of section 15 of the Shipping Act, 1916, as amended, copies of any notices and information with respect to any changes in tariffs given or made as provided for in this *Article Second*.

The remaining six out of eight articles deal with (1) filing copies of proceedings with the Board, (2) admission of new parties to and termination of membership in conferences, (3) method of giving notices, (4) the effective date of the agreement, (5) expenses of representation, and (6) termination of the agreement.

The members of the respondent Conferences have met and adopted resolutions or have collectively agreed to a common course of action at meetings held at least annually since 1953, as evidenced by written minutes which were furnished to the Board and the Commission.

At a meeting in May 1956, the following action was taken: "At the

close of each joint meeting the spokesmen for the two Conferences shall agree upon that portion of the minutes of that meeting which shall become a part of the memorandum of decisions." These memoranda are exhibits in the record of this proceeding.

I. The Supplementary Agreements

We now come to the first issue set out in the Order of Investigation, which is: Is Agreement No. 8200 a true and complete agreement between the parties? The Examiner held that the agreement was not a true and complete agreement between the parties, and that the conferences should file various "supplementary agreements"[2] with the Commission for approval before reapproval of Agreement No. 8200 is given by the Commission. The respondent conferences have excepted to this finding, arguing that these supplemental agreements are within the contemplation of the joint agreement, because the first paragraph of the joint agreement provides:

> The initial meeting shall make rules * * * for the transaction of such * * * business as the parties may be permitted to conduct by virtue hereof including the provision of the machinery for the change of rates * * *.

The conferences further argue that, even if the supplementary agreements are not encompassed within the scope of the joint agreement, they have received the blessing of the Commission's predecessor, and the Commission is prevented by reason of the principle of "administrative estoppel" from finding a violation of the Shipping Act, 1916. We disagree with respondents as to both of their arguments, for the reasons hereinafter stated.

The threshold question as we see it is whether or not the supplementary agreements are within the purview of section 15, which reads in pertinent part, as follows:

> SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board, a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agree-

[2] These supplementary agreements which deal with placement of items on the initiative list, overland rates, and concurrence procedures are described more fully, *infra*.

ment" in this section includes understandings, conferences, and other arrangements.

As early as 1927, the United States Shipping Board, one of our predecessor agencies, limited the language of section 15:

> As contended by conference representatives in this proceeding, a too literal interpretation of the word "every" to include routine actions between the carriers under conference agreements would result in delays and inconvenience to both carriers and shippers. *Ex Parte 4, Section 15 Inquiry*, 1 U.S.S.B. 121, at 125, (1927).

Subsequent cases have elaborated on the aspect of "routine actions" so as to confine the same to day-to-day interstitial workings under the agreement. Thus, in *Mitsui Steamship Company* v. *Anglo-Canadian Shipping Co.*, 5 F.M.B. 72 (1956), the Federal Maritime Board held that a "new conference interpretation is an agreement or a modification of an approved agreement between carriers which requires specific approval under section 15 of the Act, * * * " 5 F.M.B. at 91–92. And, in 1957, the Board held that an agreement between Matson Navigation Co. and Encinal Terminals was not a true and complete agreement:

> In approving Agreement No. 8063, the Board sanctioned an agreement under which Matson and Encinal were to form a corporation known as Matcinal, which agreement is little more than evidence of a general intention of the parties to enter the stevedoring, terminal, and carloading and unloading business as partners acting through the new corporate entity. *Associated-Banning Co. et al.* v. *Matson Navigation Co. et al.*, 5 F.M.B. 336, at 341 (1957).

More recently, we have elaborated on the definition of "routine" in *Pacific Coast Port Equalization Rule*, 7 F.M.C. 623 (1963). In that case we determined that a rule providing for port equalization did "not constitute conventional or routine rate-making among carriers. It is a new arrangement for the regulation and control of competition. Moreover, it affects third party interests such as ports and facilities from which traffic is drawn and it obviously is not 'a pure regulation of intra-conference competition.'" 7 F.M.C. 623, at 630. In affirming the Commission, the U.S. Court of Appeals for the Ninth Circuit stated:

> We are unable to agree with petitioners that Rule 29 is within the scope of their approved Conference Agreement. Such agreement contains no provision expressly authorizing port equalization, nor do we find any implicit authority contained therein. *American Export & Isbrandtsen Lines, et al.* v. *Federal Maritime Commission, et al.*, 334 F. 2d 185, 198 (1964).

We think that the holdings in the Commission decisions cited above clearly militate in favor of the position that the "supplementary agreements" were not within the purview of Agreement No. 8200 and were not routine, day-to-day arrangements which are exempt from the filing

requirements of section 15. The *Associated Banning* case is particularly in point. It appears to us that Agreement No. 8200 is nothing more than evidence of a general intention of the parties to enter into concerted rate-making. It sets out no details, no procedures, with the exception of the procedures to be taken at the initial meeting, nor does it inform any interested person as to how the agreement is to work.

Although not articulated in past cases, we are of the opinion that the applicable test here is whether or not the agreement as filed with the Commission and as approved sets out in adequate detail the procedures and arrangements under which the concerted activity permitted by the agreement is to take place. Any interested party should be able, by a reading of the agreement, to ascertain how the agreement is to work, without resort to inquiries of the parties or an investigation by the Commission. This is not to say that we are limiting the scope of "routine actions" which need not be the subject of section 15 filings; we are merely giving purpose to the requirements of the section. We can see no reason for the filing of agreements if they do not inform the Commission and the public in more than the barest outline as to how the agreement is to be carried out. No one reading Agreement No. 8200 could reasonably have been informed as to the procedures under which the respondent conferences were carrying out the agreement nor as to the nature of the supplementary agreements which respondents claim are within the contemplation of Agreement No. 8200. Thus, we hold that the supplementary agreements relating to rate-making initiative, overland rates, rate differentials, and the concurrence procedures (encompassing all instances of the operation of the concurrence machinery except for the placement of items on the agenda of the initial meeting)[3] are without sanction in the basic Agreement No. 8200, were therefore required by section 15 of the Shipping Act, 1916, to be filed with the Commission for approval, and, not having been so filed, were and are being carried out in violation of the said section 15.

As stated above, respondents have advanced the argument that the Commission is bound by the doctrine of administrative estoppel because the supplementary agreements received the tacit approval of officials of the Federal Maritime Board. We find that doctrine inapplicable here.

Respondents have continually been on notice as to the proper means to effectuate filing of section 15 agreements. See *Regulations for Filing Copies of Agreements Under Section 15, Shipping Act. 1916*, 46 CFR Part 522 (formerly Part 222, Sections 222.11 to 222.16). These regulations set out in detail that a letter of transmittal is re-

[3] See our discussion of the concurrence procedures, *infra*.

quired, the nature of agreements to be filed, that approval of the Commissioin is necessary, and that such approval may not be assumed until formal action is taken by the Commission.

The only agreement filed by respondents in accordance with the Commission's rules regulating the manner of filing agreements was Agreement No. 8200. The actions at the various meetings produced oral agreements which were reduced to memoranda thereof in the form of minutes. The minutes were further abstracted and put into a "Memorandum of Decisions." These were clearly not filed pursuant to the Commission's rules accompanied by a letter of transmittal "stating that they are offered for file in compliance with section 15 of the Shipping Act, 1916, * * *" 46 CFR § 522.1.

We think that the Examiner was correct when he stated:

> Respondents' contention that these agreements come within the "tacit approval" doctrine of the *Cotton* cases because of the filing of minutes and the Memorandum of Decisions, and the awareness of FMC officials of the details of the agreements just prior to and after approval, must fail because of the rejection of that doctrine on January 10, 1963, by the United States Court of Appeals (D.C.) in *H. Kempner* v. *Federal Maritime Commission*, No. 16,658 [313 F. 2d 586]. The Court held that the dual-rate agreements there involved "were not approved by the regulatory agency merely because it was silent concerning them, and the rates (established pursuant to such unapproved agreement) were therefore illegal." Initial Decision, p. 20.

II. The Concurrence Procedures

The Examiner found in his Initial Decision that the supplementary agreement requiring both respondent conferences to concur in matters voted on is sanctioned by the joint agreement, but is in violation of Public Law 87-346. We think that a brief discussion of the concurrence procedures as we understand them is in order.

First, all matters coming before the initial meeting held pursuant to the agreement were subject to concurrence before being placed on the agenda of the initial meeting. Agreement No. 8200 specifically provides that "All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the PACIFIC LINES acting as a group, and of the ATLANTIC/GULF LINES, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates." The above-quoted provision is the only specific reference in Agreement 8200 to the concurrence procedure. However, the initial meeting and procedure adopted subsequent thereto extended the concurrence procedure in the following additional cirmumstances:

(1) The assignment of items to the initiative list is subject to concurrence, although there is a prior requirement that 70 percent of the total annual movement of cargo of a particular item must be handled by the conference obtaining that item on its list. The Examiner found (Initial Decision, pp. 4–5) that "At the initial meeting * * * respondents established the basic principles * * *(4) the manner of voting on the assignment to a conference of rate-making power or 'initiative' on certain items, and the manner of voting of individual rate applications on other items * * *."

(2) Rate changes on competitive items are subject to concurrence, as found by the Examiner (Initial Decision, p. 5) that the parties set up machinery governing "the manner of voting on individual rate applications on other items, i.e. a requirement that both conferences must concur in all such actions." This is admitted by one of the respondents, Pacific Westbound Conference, in its Exceptions to the Initial Decision:

> Moreover, the ultimate treatment of shippers whose commodities are on the initiative list and of those whose commodities are not on the list is exactly the same * * *. The procedure is no different for initiative commodities. Exceptions, p. 21.

(3) Rate changes on initiative items are subject to concurrence where the conference requesting a particular change does not have the initiative (i.e., such as the request for change in rate on evaporated milk when PWC did not have the initiative). This fact is borne out by the record developed in this case, and, more particularly, by the facts pertaining to the charge of discrimination made by Carnation Company (which will be discussed, *infra.*) These added instances of the operation of the concurrence procedure appear to us to go far beyond an agreement to concur in matters voted on. Were we confined to the latter, we could agree with the Examiner that the basic agreement sanctions the concurrence procedure. However, the concurrence procedures touch other matters than the content of the agenda of the initial meeting. Respondents will therefore be required to cease and desist from carrying out the concurrence procedures until the same be filed with and approved by the Commission.

The respondent conferences have excepted to the Examiner's finding that the concurrence procedure does not meet the tests of the "independent action" provisions of P.L. 87–346. The conferences point out that *Article Second* of Agreement No. 8200 "clearly reserves the right of each conference to act independently of the procedures adopted in and pursuant to the agreement." The Examiner decided "as a matter of law that the concurrence provision is illegal, regardless

of any testimony in support thereof." He relied on the provision of section 15 which directs the Commission not to approve any agreement between conferences and carriers serving different trades that would otherwise be competitive unless each conference retains the right of independent action. The Examiner has held that the statutory requirement is not met if, under certain circumstances, the parties do not exercise the right of independent action. The Examiner has therefore translated the mere existence of the right to a requirement that it be exercised. We think that the Examiner has applied the statute too strictly, and we therefore sustain the conferences' exception.

Section 15 provides a standard for approval of agreements based on the contents of the agreements. In the instant case, the agreement creates a "right" of independent action after certain preliminary notices to the other party. The Examiner, however, considered that the facts of the operation of the agreement are controlling, rather than the bare provisions of the agreement, relying on selected excerpts from House Report 498, 87th Cong., 1st sess., pp. 9–10 which in turn refer to how a joint agreement "has operated." We believe that Congress was only restricting the authority to approve agreements when it enacted P.L. 87–346, and was not establishing standards by which to judge the operations of agreements. Upon an initial examination of an agreement between conferences, we are confined to a determination as to whether or not the agreement provides for the right of independent action. That is all the statute requires. And, Agreement No. 8200 meets the statutory requirement in specific terms. This is not to say, however, that in the future we would be confined to "the four corners" of an agreement in a subsequent proceeding to determine whether an agreement should be reapproved, modified, or disapproved. It could well be that actual operations under an agreement, subsequent to our initial approval, might show that the agreement was being carried out in a manner as to make it detrimental to the commerce of the United States or contrary to the public interest. Then, disapproval would be in order.

In conclusion, the statute provides adequate means for disapproval should the same be required. We do not, however, find that such disapproval is warranted by the evidence of record in this case. We are unable to find any evidence of a secret agreement between Pacific Westbound and Far East that Pacific Westbound would give up its right of independent action. Such an agreement, we hold, has never existed. The right was created in Agreement 8200 in conformance with the statutory requirement, and it was never given up.

Appendix A

III. The Initiative List

The Examiner found that the manner of determining whether or not commodities are placed on the rate-making initiative is violative of section 16 of the Shipping Act, 1916, in that the procedure subjects shippers to undue prejudice and disadvantage. The conferences have excepted to this finding, and the Far East Conference has taken further exception to the Examiner's finding that it unjustly discriminated against Carnation Company by refusing to concur in Pacific Westbound's requests for the initiative on evaported milk until May of 1961.

The initiative procedure provides a method whereby certain commodities are classified in two categories in such a way as to locate the power to change rates with or without agreement or concurrence. The conferences first agreed that the so-called "local initiative" rate-making authority would be established with respect to an agreed list of commodities if 70 percent of the total annual movement originated in either conference's local territory. Later, in 1956, the method of agreeing on the commodities to be listed was changed to require concurrence by the other conference before establishing "rate-making initiative on commodities, pursuant to the formula." An agreed list was then prepared.

The commodity evaporated milk in 1953 was not classified and placed on the list of Pacific Westbound and remained off the list until 1961, after this proceeding was instituted, even though in 1960–61 90 percent or more of the evaporated milk was moving from the West Coast to the Philippines. The record shows that before 1961 Far East had refused to concur in such placement in spite of the formula commitment the conferences made to each other regarding the 70 percent test.

A right to concur was established in May 1956, when it was agreed "authority to establish rate-making initiative on commodities pursuant to the formula defined in the preceding paragraph [the 70-percent formula] may only be granted * * * after concurrence by the other Conference."

Carnation, a shipper of evaporated milk, was affected before and after the right to concur was established. Before May 1956, evaporated milk remained off the initiative list of Pacific Westbound for no apparent reason, and after May 1956 because Far East would not concur. Apparently, no request should have been needed in either period to classify evaporated milk as an "initiative" commodity. Carnation's first record request for a rate change by Pacific West-

bound was on November 11, 1957, after the addition of the concurrence procedure. Carnation was unsuccessful because Far East would not concur, although at this time Carnation did not know why because the the initiative list and concurrence procedure were still secret [4] as far as Carnation was concerned. Carnation persisted in its efforts and Pacific Westbound persisted in trying to obtain concurrence (December 1957 through May 1958—13 exchanges between Far East and Pacific Westbound), but without success for 3 years, even though Far East was handling 10 percent or less of the volume of evaporated milk shipped to the Philippines.

Both before and after the concurrence procedure was added, Carnation and the public had every reason to believe that Pacific Westbound was making its own decisions on rates based on the economics of shipment from the West Coast. It was developed in the record that this was far from the case and not only was the concurrence procedure interfering with Pacific Westbound's initiative decisions, but that Far East had conflicting interests in that it had to protect the movement of powdered milk from the East Coast. A shipper of powdered milk had demanded the same reduction as evaporated milk so a change in the evaporated milk rate would affect the revenues of Far East members.

This conduct on the part of Far East and acquiescence therein by Pacific Westbound in the exercise of their respective powers shows that the 70 percent rule for giving the rate-making initiative, whether or not affected by the concurrence restriction, became a sham. The agreed-upon condition called for the exercise of independent action by Pacific Westbound, but it failed to act independently as it had a right to do under *Article Second* of Agreement No. 8200. Both Far East and Pacific Westbound, we hold, subjected Carnation, as a shipper; West Coast ports, as localities; and the commodity evaporated milk to unreasonable disadvantage in violation of section 16 of the Shipping Act, 1916. In our opinion the respondents' failure to abide by commitments when it suited the interests of the parties, without satisfactory reason, made the disadvantage "unreasonable."

In our view, Pacific Westbound violated section 16 of the Shipping Act, 1916, by not taking independent action when it clearly had the right so to do. This is not to say that the right had been surrendered, or that the circumstances of this case warrant a disapproval of Agreement No. 8200 under section 15 of the Shipping Act. We rest our charge against Pacific Westbound solely on section 16 of the Act.

[4] The minutes of the first meeting state that the "proceedings of minutes are confidential" and that "unauthorized disclosure to shippers of information regarding rate changes" and positions "regarding rate requests is contrary to the spirit of the Joint Agreement."

Likewise, Far East violated section 16 of the Act, but here the violation results not from a failure to carry out the terms of an approved agreement (as in the case of Pacific Westbound) but in Far East's failure to implement fully the terms of the supplemental agreements as we understand them. We have no difficulty, however, in finding this conduct on the part of Far East to be a violation of the Shipping Act. Section 16 does not specify that "any undue or unreasonable prejudice or disadvantage" shall flow from a failure to adhere to *approved* agreements.

We think that it would be a most unrealistic view to hold that Far East's conduct is without the scope of the Shipping Act, merely because it consisted of a failure to adhere to unfiled and unapproved agreements. Likewise absurd would be a holding that because the agreements were unfiled and unapproved, no violation of the act could result from Far East's conduct. From whatever sources the violation arose, the conduct constituted "undue or unreasonable prejudice or disadvantage" and was in violation of the act.[5]

IV. Overland Rates

The second supplementary agreement which we have found, *supra*, not to have been filed for approval concerns the maintenance of rate differentials for commodities from the overland territory. Briefly stated, the agreement provides that the conferences would continue to establish rates for commodities from the overland territory without any change in previously established differentials. The previously established differentials appear to have been fixed as far back as 1925.

Respondent Pacific Westbound follows the procedure of reducing its rates on commodities originating in overland territory below its rates on commodities originating in local territory to an amount equal to the rates shippers would pay, after adding their inland railroad rates, if they used Far East Conference's members from either Atlantic or Gulf of Mexico coast ports.

This supplementary unfiled agreement, intended originally to be temporary, has been carried out for over a period of 10 years. Under the agreement, the competitive relationship between the two Conferences, through their power to fix rates independently of each other, has been regulated so as to produce an automatic reduction in the local rates of the members of the Far East Conference. There is also a restraint on Far East in reducing the differential between the local

[5] We note that Carnation has not filed a timely complaint for reparations under section 22 of the Shipping Act, 1916, and that such a complaint would now be barred by the 2-year Statute of Limitations in that section.

rates of Far East and the overland rates of Pacific Westbound. The overland rate differentials which are in "status quo" thus have a restraining effect on competition, regardless of the provisions of the basic agreement (8200), because of the knowledge that a change by one will be offset by a change by the other.

The Examiner found that Agreement No. 8200 should be amended to incorporate the overland agreement, and "as amended Agreement No. 8200 should be reapproved." Such action implies approval of the overland agreement.

We find ourselves in disagreement with the Examiner, not on the merits of approvability of the overland agreement, but rather on the issue of whether or not we are able on the basis of the record in this case to make a finding as to approvability. The approvability of the overland agreement is not at issue in this proceeding, and this fact was recognized by the Examiner in his statement that "the question of the lawfulness of the overland rate structure *per se* was ruled out as a direct issue in this proceeding * * *." No one has challenged any rate structure in this proceeding; the issues revolve around competitive relationships. We have nothing before us to indicate what respondents' complete overland agreement might be, so approval would be premature. For this reason we sustain the exceptions of the Port of New York Authority and the North Atlantic Ports Association that the overland rate agreements should be dealt with separately. We cannot, however, agree with the intervenors that the evidence of record compels a finding that the agreements are unlawful and cannot be approved. Respondents will be required to file their overland rate agreements subsequent to the issuance of this report, and the lawfulness of the agreements can then be determined separately from this proceeding.

V. Proposed Modifications of Agreement No. 8200

The Examiner held that Agreement No. 8200 should be reapproved and should be modified by amendment to incorporate "the complete agreement found herein to be outside the scope of said agreement." The words "complete agreement" refer to the supplementary agreements (1) creating ratemaking initiative powers, (2) establishing procedures for the operation of the concurrence machinery, and (3) the overland rate agreement.

On the basis of the record before us, we find insufficient evidence to disapprove Agreement No. 8200. The evidence as to conflicts of interest in voting was not developed to the point of proving detriment to the commerce of the United States or that the agreement was contrary

to the public interest: While we have in fact sustained the charge of discrimination against Carnation, this of itself does not constitute enough evidence on which to base disapproval of Agreement No. 8200 at this time. One instance of discrimination is not sufficient to prove competitive detriment to the Pacific Coast of such magnitude to warrant disapproval of the agreement. In this respect we overrule the exception of Hearing Counsel.

The Examiner refers to the supplementary agreements as though they might be approved in their present form. However, their present form is far from definite. The supplementary agreements which we have found to have been unfiled and to have been required to be filed consist of oral agreements reduced to memoranda, in the form of abstracts or summaries of minutes of meetings. If it has been assumed that these are now before the Commission for approval, the assumption is misplaced. They are only before us in the form of exhibits in this record and cannot be treated as filed agreements. Filing pursuant to the regulations of the Commission is an essential prerequisite to an adjudication as to approvability. We find that on the basis of this record it is impossible to determine the scope of the unfiled supplementary agreements, the precise subjects covered by the agreements, the objectives to be achieved, and whether or not the agreements can be approved pursuant to the standards set forth in section 15 of the Shipping Act, 1916. We therefore reverse the Examiner to the extent that he found that Agreement No. 8200 should be reapproved after the amendments are filed. Should the parties to Agreement No. 8200 decide to file these supplementary agreements, they would then be in a form suitable for action by the Commission pursuant to section 15.

CONCLUSION

In summary, we conclude:

(1) That the various supplementary agreements affecting overland rates, the concurrence procedures, and the placement of items on the initiative list, constitute unapproved agreements which should have been filed with us for action pursuant to section 15; and not having been so filed and approved the parties to Agreement No. 8200 are hereby ordered to cease and desist from carrying them out;

(2) The doctrine of administrative estoppel is inapplicable as regards so-called "tacit approval" by various members of the staff of our predecessor agency of these supplementary agreements;

(3) The right of independent action is preserved by Agreement No. 8200, as required by section 15 of the Shipping Act, 1916, and neither

party is found to have surrendered the right by means of a secret agreement;

(4) Past conduct by respondents in regard to their treatment of Carnation Co. has been in violation of section 16 of the Shipping Act, 1916;

(5) The Commission cannot at this time guarantee reapproval of Agreement No. 8200 if the various supplementary agreements are filed for approval, as the scope, contents, and procedures carried out under these agreements are uncertain; and

(6) There is insufficient evidence in the record before us on which to base disapproval at this time of Agreement No. 8200.

Respondents will be ordered to cease and desist from carrying out their supplementary agreements until filed with and approved by the Commission. An appropriate order will be entered.

A separate opinion concurring and dissenting with the majority report will be issued on or about August 2, 1965, by Commissioner John S. Patterson.

Commissioner John S. Patterson, concurring and dissenting:

I. Proceedings

The Federal Maritime Board (Board), now the Federal Maritime Commission (Commission), upon its own motion as authorized by Sec. 22 of the Shipping Act, 1916, as amended (Act), on October 26, 1959, entered into an investigation and hearing to determine whether (1) an agreement between the common carriers by water in foreign commerce, members of Far East Conference (Far East), and the common carriers by water in foreign commerce, members of Pacific Westbound Conference (Pacific Westbound), (Agreement No. 8200) approved December 29, 1952, pursuant to section 15 of the Act, was the true and complete agreement between the parties, and whether (2) Agreement No. 8200 (a) was being carried out in a manner which makes the agreement unjustly discriminatory or unfair as between carriers, shippers, exporters or ports, or between exporters from the United States and their foreign competitors, or, (b) operates to the detriment of the commerce of the United States, or (c) violates the Act.

A separate concurring and dissenting report has been prepared in the belief that the majority has failed to deal with the facts and exceptions consistently with what I consider to be our responsibilities under the Administrative Procedure Act and that the Commission is not authorized to issue a "cease and desist" order on this record. A summary follows of (A) my reasons for these three subject objections, (B) the Examiner's findings and conclusions, (C) the exceptions of

the participants in this proceeding, (D) my proposed rulings on the exceptions, and (E) my proposed conclusions resulting from the discussion of the issues.

(A) Objections.

1. The facts. A separate statement of the facts as I find them from the record to exist and to control my reasoning has been prepared, instead of using those "found" by the Examiner, or as they "appear" or are only "apparently" so. The details of the supplementary agreements are not assumed to be defined somewhere, but are described as to how they came into being and as to what they do.

2. The exceptions. The record must show the ruling upon each exception presented by the parties. Far East properly presented five itemized exceptions, and Pacific Westbound also properly presented nine itemized exceptions, as they are both given the opportunity and are required to do. Each exception was explicit, clearly understandable, and capable of being ruled upon. The majority refers to the respondents excepting to the finding "that the agreement was not true and complete * * * and that the conferences should file 'various supplementary agreements'." I have been unable to locate such an exception by both conferences except under a most liberal interpretation of the parties' statements. In other respects the majority discusses some but not all of the exceptions, and does not expressly show the ruling upon all the exceptions I consider to have been presented. By this method the parties are denied their right to a ruling backed up by reasoning showing why they are right or wrong and to a final decision on where they stand on each of their objections as to what the Examiner has decided about their rights. To meet this objection, the exceptions have been summarized to avoid repetition and some have been lumped together where they were believed to be of a similar nature, itemized by topics, and a ruling has been proposed for each.

3. The "cease and desist" order. The majority has committed the Commission to issuing an order requiring respondents to cease and desist from carrying out the concurrence procedures. The concurrence procedures have been used for many years and, apart from any question of whether the procedures are also subjects of an agreement, the actions required are believed by respondents to be lawful. Whatever the actions may be, there has been no adjudication of their unlawfulness, and until there is we have no authority to tell them to stop. The fact that the actions are taken pursuant to an agreement which has not been filed does not make the action unlawful. Failure to file an agreement is a separate offense with penalties prescribed in section 15. If respondents want to stop because the acts depend on an unfiled

agreement with penalties for each day's failure to file, no order will be necessary.

(B) Examiner's Findings and Conclusions.

1. Far East did not breach Agreement No. 8200 by failure to take independent action when it was unable to make Pacific Westbound change its method of billing freight for the transportation of flour from a net weight to a gross weight basis. The Port of Galveston, which made the claim of breach, did not except to the Examiner's conclusion.

2. Respondents' agreements with respect to (a) the rate-making initiative, (b) overland rates, and (c) rate differentials should have been, but were not, filed with the Commission for approval in violation of section 15 of the Act; the agreements have not been approved by the Commission; and the agreements have been carried out in violation of section 15 of the Act.

3. The concurrence provision consisting of a requirement that both conferences concur in matters voted on by the conferences is authorized by the approved basic agreement and therefore has in effect been filed and is not in violation of the filing requirement of section 15 of the Act.

4. The concurrence provision in Agreement No. 8200 is illegal and must be stricken from the agreement, as a violation of the "independent action" clause of section 15 of the Act.

5. It has not been shown that there has generally resulted any substantial delays in the processing of requests for concurrence.

6. The record does not sustain the allegations (a) that the concurrence agreement failed to afford equal protection to the conferences; or (b) that it deprived the Pacific Coast of its natural competitive advantages; or (c) that it operated to the competitive disadvantage of the Pacific Coast, its shippers, exporters, ports, and carriers.

7. Any charge of domination of one conference by the other has not been sustained.

8. The filing of voting records should not be required in this proceeding.

9. The matter of classification of commodities as between initiative and noninitiative cargo subjects shippers to undue prejudice and disadvantage in violation of section 16 of the Act.

10. The rate-making initiative agreement is not otherwise unlawful.

11. Agreement No. 8200 has not operated to the detriment of the commerce of the United States or otherwise contravened section 15 of the Act.

12. Agreement No. 8200 should be amended to incorporate the complete agreements found to be outside the scope of said agreement, with such changes as will comport with the Examiner's findings.

13. As amended, Agreement No. 8200 should be reapproved.

The Examiner's conclusions in items 2, 9, and 11 are sustained; those in items 3, 4, 12, and 13 are reversed; item 6 is not ruled on as premature on this record; and those in items 1, 5, 7, 8, and 10 are not expressly dealt with as being outside the scope of the order notifying parties of the issues.

(C) Exceptions.

The exceptions by the respondents are that the Examiner made the following errors:

1. In concluding that the obligation in Agreement No. 8200 that each party must concur in certain rate actions by the other party is prohibited by law.

2. In concluding that existing procedures by which commodities are classified as giving one party or the other the initiative in making rate adjustments without asking for the concurrence of the other party violates section 16 of the Act.

3. In concluding that Far East unjustly discriminated against intervenor Carnation Co. (Carnation) by refusing to concur in Pacific Westbound's requests for rate-making initiative on evaporated milk until May 1961.

4. In concluding that the following actions by respondents created agreements which were not filed with and not approved by the Commission.

a. Mutually consenting to establish a classification of local cargo as "local competitive" and "local initiative."

b. Mutually consenting to establish conditions under which certain overland rates might be established.

c. Mutually consenting that certain minimum rate differentials resulting from the overland rate structure would be maintained in "status quo."

5. In failing to rule on 21 findings of fact as demanded by respondent Far East.

6. In making certain statements that (a) *Article Second* of Agreement No. 8200 is honored more in the breach than in the observance, (b) the respondents do not consider the right of independent action an instrument of practical employment, and (c) "there was considerable trading" in the granting of the local initiative to change rates.

The exceptions by the intervenors are that the Examiner made the following errors:

Appendix A

1. The Port of New York Authority (Port Authority) takes issue with the Examiner's apparent approval of the agreements relating to overland rates.

2. The San Diego Unified Port District (Port District) states the facts do not not support the Examiner's conclusions that the concurrence agreement does not deprive the Pacific Coast of natural competitive advantages or operate "to the competitive disadvantage of the Pacific Coast, its shippers, exporters, ports and carriers."

The exceptions by Hearing Counsel are that the Examiner made the following errors:

1. In concluding that the rate-making initiative agreement should be approved as modified.

2. In concluding that Agreement No. 8200 has not operated to the detriment of the commerce of the United States.

3. In concluding that the concurrence procedure and rate-making initiative agreement and Agreement No. 8200 do not operate to the detriment of the West Coast.

No exception was taken to the Examiner's conclusion in (A)1.

(D) Rulings on Exceptions.

The following rulings on the exceptions are based on the conclusions, findings, discussion, and facts which follow.

1. Respondents' exception in 1 is sustained and the Examiner is reversed for the reasons in the discussion establishing that Congress did not, as a matter of law, make past operations under the right of independent action clause in item (1), second paragraph of section 15, the test of approvability of an agreement reserving the right, but made the existence of an obligation to recognize the right the test. It was found that *Article Second* of Agreement No. 8200 created the right.

2. Respondents' exception in 2 is not supported and the Examiner is sustained insofar as the Examiner concludes that section 16 has been violated. The existing procedures, where shown to be a sham and as established by past practices, did not conform with agreements regulating each respondent's rights to initiate rate changes on evaporated milk. Respondents subjected a person and localities to undue and unreasonable disadvantage by not fixing rates on evaporated milk in conformity with commitments as to how such rates were to be changed and by not establishing rights based on dominant economic interests concerning the power to make rate revisions.

3. Respondents' exception in 3 is not supported and the Examiner is sustained. It was proven that respondents unreasonably refused to place commodities on an "initiative" classification list because Far

East unreasonably refused concurrence to the classification of commodities in accordance with their agreed procedures, and Pacific Westbound unreasonably refused to take independent action to establish its own rate in response to Carnation's requests.

4. Respondents' exception in 4 is not supported and the Examiner is sustained. It was proven that respondents failed to file any of their agreements, described in section 15 of the Act, made at meetings over a period of many years, and that with the exception of the procedure for changing rates without concurrence on short notice, none were sanctioned by Agreement No. 8200. The Examiner, however, was in error in reviewing the agreements as though they were filed. Unfiled agreements may not be approved or disapproved. The form in which they appear in this record does not constitute filing, and no conclusions or findings can be made on unfiled agreements.

5. Respondents' exception in 5 refers to 21 unused proposed findings of fact dealing with the history of actions and agreements antecedent to Agreement No. 8200, with lack of secrecy, claimed benefits, arguments, evaluations, and descriptions of how meetings and other procedures operate. None of these factors constitute relevant bases for any different conclusions. All are matters of extenuation or excuse having no basis in the statute. The exception is rejected and the Examiner sustained.

6. Respondents' exception in 6 to certain statements by the Examiner does not change any conclusion and no ruling sustaining or reversing is made.

7. Intervenors' exceptions in 1 and 2 to the apparent approval of the overland rate agreement is sustained and the Examiner is reversed. The question of final approval of the agreement to concur on certain rate-change decisions is premature on this record.

8. Hearing Counsel's exception in 1 relates to approval of the initiative agreement, which I consider is premature because it has not been filed. Exceptions 2 and 3 refer to the continued approval of Agreement No. 8200 because it operates to the competitive detriment of the West Coast and to the detriment of the commerce of the United States. This issue is likewise premature because the record was not developed. Accordingly, Hearing Counsel's exceptions are rejected.

The facts forming the basis of the discussion, findings, and conclusions herein are stated separately at the end of this report.

(E) Proposed Conclusions.

1. It is concluded as follows:

a. Agreement No. 8200 should not be disapproved (based on findings 1, 2).

b. The respondents have entered into agreements fixing and regulating transportation rates, controlling and regulating competition, regulating the character of freight traffic to be carried, and providing for cooperative working arrangements as a result of decisions made and agreements entered into at their meetings (based on finding 3).

c. The minutes of meetings evidencing decisions are memorandums of oral understandings, agreements, or other arrangements and are agreements as defined in section 15 of the Act (based on finding 3).

d. The aforesaid agreements were not filed immediately with the Commission (based on finding 4).

e. Agreement No. 8200 does not include or sanction any of the aforesaid agreements; therefore, approval of Agreement No. 8200 does not include approval of the unfiled agreements (based on findings 5, 6, 7).

f. The respondents have carried out in whole and in part, directly, agreements subject to filing and approval under section 15 (based on finding 8).

g. The provisions of *Article Second* of Agreement No. 8200 conform to the requirements of item (1), second paragraph of section 15 of the Act (based on finding 9).

h. The unfiled agreements between respondents have been carried out in a manner which is in violation of the second paragraph, item (1) of section 16 of the Act, by subjecting Carnation as a particular person and evaporated milk as a description of traffic to undue and unreasonable disadvantage (based on findings 10, 11).

2. The ultimate conclusions derived from the foregoing are that respondent common carriers by water, members of Far East Conference and of Pacific Westbound Conference:

a. Violated section 15 of the Shipping Act, 1916, as amended, (1) by failing to file immediately and (2) by carrying out before approval, in whole and in part, directly, agreements as defined in section 15.

b. Violated section 16 of the Shipping Act, 1916, as amended, by subjecting a particular person and description of traffic to undue and unreasonable disadvantage.

II. Findings

The foregoing conclusions are based on the following findings, derived from the facts and discussion herein:

1. The agreement between Far East Conference and Pacific Westbound Conference made the 5th day of November, 1952, was filed with and approved by the Federal Maritime Board as of December 29, 1952, and designated Agreement No. 8200 (facts 1, 2, 3).

2. Agreement No. 8200 is the true and complete agreement covering

procedures for immediate changes in tariffs and the rates therein by either party, subject to prescribed notices being given (facts 4, 5).

3. The respondents, after November 5, 1952, made additional agreements, not a part of Agreement No. 8200, on the following subjects, as of the dates noted (facts 6, 7):

a. A conference shall have the right to classify and add to a list of commodities over which such conference shall have the power to initiate rate changes without the concurrence of the other if 70 percent of the total annual movement of a commodity is through the ports a conference serves, but shall obtain concurrence before a commodity is placed on the list. An initial list was agreed to (January 30, 1953) (fact 11a).

b. A conference shall have no right to change a rate without the approval of the other on commodities originating in a defined local territory if it is not on the list of commodities as to which it has the power to initiate rate changes without prior approval (January 30, 1953) (fact 13).

c. The local ocean rate basis used for comparative purposes between Atlantic, Gulf, and Pacific shall comprise the total ocean freight plus handling charges, tolls, or wharfage paid by the cargo through either Atlantic, Gulf, or Pacific ports (January 30, 1953) (fact 11b).

d. Existing (i.e., historically established) overland rate spreads (differentials) shall remain unchanged (status quo) until a study has been made of overland rates (January 30, 1953, and May 5, 1955) (fact 13).

e. Rate-making initiative power shall be limited to a decision as to the rate, effective and expiration dates, quotation period, and beginning or ending contract rates, and the conference having the initiative may not make other changes without concurrence by the other (May 5, 1955) (fact 13).

f. The authority to establish rate-making initiative on commodities pursuant to the agreement in a above may only be exercised after concurrence by the other conference (May 10, 1956) (fact 13).

g. Agreement on other subjects such as the right to interpret additional items to initiative status (May 10, 1956), the right to extend expiration dates on open-rated commodities after concurrence has been given (March 10, 1960), the duty not to divulge information in regard to changes in rates (January 30, 1953), the duty to use uniform minimum bill-of-lading charges (September 25, 1953), the obligation not to change the weight or measurement basis of rates without prior agreement (January 30, 1953), as shown in the record (exhibits 3 and 3A) (facts 11, 12, 13).

4. The published rules of the Commission require the agreements described in section 15 of the Act to be accompanied by a letter of transmittal stating they are offered for file and specifically requesting approval before they will be considered as filed under section 15. Such letter did not accompany any agreement submitted by respondents after November 5, 1952 (fact 10).

5. The memorandums of oral agreements were not shown to have been filed with the Commission or with any of its predecessor agencies, as required by Commission rules (fact 8).

6. The meetings between officials and employees of the Board and representatives of Far East or Pacific Westbound did not result in any revision or waiver of the rules requiring filing in accordance with prescribed procedures, nor in any approval of later agreements (facts 2, 3, 9).

7. The memorandums of oral argreements were not approved by the Commission or by any of its predecessor agencies (fact 8).

8. The respondents have carried out before approval by the Commission, in whole or in part and directly, the agreements made pursuant to decisions embodied in the minutes of their meetings.

9. (a) The agreement by each respondent qualified by the rights conferred by the *Article Second* of Agreement No. 8200 gives each respondent a right to change rates subject only to prescribed notification and constitutes the reservation of a right of independent action (facts 4, 5).

(b) Far East and Pacific Westbound are conferences of carriers serving different trades because of the differences in the ports of origin they serve, and are naturally competitive with respect to many commodities shipped from inland points in the United States, because the destination ports they serve are substantially the same (fact 15).

10. The respondents failed to live up to their commitments regarding the formulation of a list of commodities classified as subject to the power of each conference to change rates without concurrence of the other (fact 14).

11. Respondents subjected the particular person Carnation Co. and the description of traffic evaporated milk to undue and unreasonable disadvantage when Far East made Carnation pay unduly high transportation rates by refusing to concur, without reason, and Pacific Westbound failed to enforce, either before or after May 1956, its power to initiate rate changes on evaporated milk in response to requests by Carnation (fact 14).

12. Evidence or proposed findings (21 in number) by respondents dealing with the history of actions and agreements antecedent to

Agreement No. 8200; the lack of secrecy in making arrangements; claims of benefits in agreements; arguments; and evaluations and descriptions of how meetings and other procedures operate are rejected because they are without relevance to the existence or nonexistence of agreements.

III. Discussion

A. True and complete agreement issues.

1. Additional agreements were made.

The first issue propounded by the order of investigation was whether Agreement No. 8200 was the "true and complete" agreement between respondents. This statement is taken to mean we should determine whether there existed additional agreements which were not filed and thereafter approved.

Section 15 of the Act requires every common carrier by water, such as the respondents herein, members of the two conferences, to file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier fixing or regulating transportation rates, giving or receiving special rates, controlling, regulating, or preventing competition, limiting or regulating in any way the volume or character of freight traffic to be carried, or in any manner providing for a cooperative working arrangement. The term "agreement" includes understandings and other arrangements. The Commission's published rules state the method of accomplishing the required filing in the Code of Federal Regulations, Title 46 (CFR).

The only agreement filed by respondents in accordance with the Commission's rules regulating the manner of filing agreements was Agreement No. 8200. The facts showed that actions at the various meetings produced additional oral agreements which were reduced to memorandums thereof in the form of minutes, which were abstracted and put into a memorandum of decisions. The parties agreed that the memorandum constitutes a correct statement of their decisions.

The decisions defining rights and stating what was to happen resulted in four types of understandings and arrangements:

a. Local and overland territories were defined (docket subject No. 4, meeting No. 1).

b. Cargo commodities were classified into (1) local initiative, (2) local competitive, and (3) overland (docket subject No. 5, meeting No. 1).

c. Differentials in freight rates were established with regard to commodities, allowing Pacific Westbound to maintain certain mini-

mum differences. Where a conference having the initiative changes a rate, the other has the privilege of meeting the rate with Pacific Westbound having the right to maintain such difference, and when Far East adjusts Pacific Westbound makes the same dollar adjustment in its local and overland rates (docket subject No. 4, meeting No. 3).

d. Procedures were established requiring concurrence of each conference in certain rate changes (docket subject No. 13, item 7, meeting No. 1).

The effect of the foregoing is to change competitive relationships and to fix or revise freight rates consistently with the agreed competitive relationship.

The purpose of these decisions was shown to be to allocate authority between the two conferences in such a way as (a) to designate which conference makes the final decision on what the rates of both should be and to indicate whether the decision was to be made with or without the concurrence of the other, and (b) to limit the authority of both conferences to change certain established relationships between rates no matter how the rate-fixing decision is made by either. Item (a) was accomplished by a procedure to consult and obtain approval, called a concurrence, and item (b) was accomplished by mutual obligations to maintain, unchanged, certain rate relationships ("spreads") until a study was completed. The obligation to obtain concurrence before deciding on a rate was qualified by specifying (1) which conference might initiate decisions and what details the initiator may decide, (2) the decisions where no concurrence obligation existed, and (3) the procedures to be followed in communicating decisions and obtaining approvals.

It is concluded that these actions established new and continuing mutual obligations and are agreements. The circumstances occurring before and after agreements made at meetings referred to in the 21 findings of fact are not relevant because such facts do not change, and ought not be used to confuse, what occurred at the moment of each agreement, nor do they alter any agreements once established.

The next question is whether the agreements are agreements as described in section 15 of the Act.

Certain preexisting rate spreads covered by the local overland territorial divisions were continued unchanged ("remain status quo") at the first joint meeting in January 1953 (item No. 4, joint memorandum of decisions), and the rate-making initiative authority was made subject to concurrence by the noninitiating conference at the Joint Meeting in May 1955 (item No. 3, joint memorandum of decisions).

The territorial divisions served as the basis for classifying commodi-

ties whose shipment originated in the local territories as "local initiative" and "local competitive" commodities, and for classifying the commodities originating in between as subject to rules regulating overland rates. The decisions as to initiative and competitive classifications were that certain commodities would be subject to the authority of the members of one conference to initiate rate changes and these commodities are said to be in a "local initiative" commodity category. If one conference has been authorized to initiate a rate change, it may adjust the rate, its effective date, its expiration date, the period of quotation or forward bookings, or the establishment or termination of contract rates. In order to qualify for a local-initiative classification, 70 percent of the total annual movement of any one commodity in an agreed list of commodities would establish the initiative for exercising rate-making authority. After May 1955, concurrence was required before the conference having rate-making initiative could change the rate basis, terms and conditions, or open or close rates. Other changes requiring concurrence were also decided upon. All commodities not classified as local initiative were local competitive. With regard to the latter commodities, the decision was that changes in rates by either conference had to be concurred in by the other conference. In other words, the two conferences had to agree before a changed rate could be charged, and a large part of the time taken up at annual conferences, as shown by the minutes, was spent in reviewing and agreeing on rate changes for individual commodities. Special procedures were provided for reaching agreement expeditiously where concurrence was required between annual meetings.

Far East and Pacific Westbound agreed that a minimum difference between the rates from the coasts served by each should exist "measured by the accessorial charges assessed the cargo by Pacific and that on those items which presently carry a lesser difference Atlantic [Far East] may adjust upward to the above measure or Pacific may adjust downward and where present difference is greater than the amount of accessorial charge, same will be maintained, unless otherwise mutually agreed."

Overland commodities are those which move under the terms of the Pacific Westbound overland tariff. The tariff applies roughly to all commodities originating east of the Rocky Mountains and received by Pacific Westbound carriers under through rail-ocean bills of lading. As to the freight rates on overland commodities, the two conferences agreed that the "present Overland rate spreads remain status quo, pending outcome of the Overland Rate Study by the two Conferences."

The decisions at meetings were oral and recorded in minutes which are considered as memorandums of oral agreements.

It is concluded that the additional agreements having the effect and purpose described are agreements described in the first paragraph of section 15 of the Act because they:

(a) Give special privileges and advantages and regulate the character of freight traffic to be carried when they establish the list of commodities subject to initiative power to change rates and make a commodity eligible for the initiative list if 70 percent of total annual movement of a commodity is shipped from an area.

(b) Fix and regulate transportation rates and give special advantages when they specify rates for separate commodities, define the commodities and territories for the purpose of giving differing powers to change rates with or without concurrence, or when they establish a principle of parity or prescribe differentials in certain rates.

(c) Give and receive special privileges and advantages and regulate competition when they establish local and overland territories.

All of the agreements further involve the control or regulation of competition and cooperative working arrangements. Agreements such as these go well beyond the authorization to make rules for the transaction of business, including machinery for the change of rates. Court decisions substantiate the conclusion noted.

The subjects of the agreements evidenced by the minutes are neither changes in the dollar amounts of rates which do not have to be filed (Ex Parte, *Section 15 Inquiry*, 1 USSB 121, 125 (1927)), nor rules and regulations governing the application of the rates (*Empire State Highway Transportation Ass'n* v. *FMB*, 291 F. 2d 336 (D.C. Cir.), *Cert. denied* 368 U.S. 931 (1961) and the *Mitsui* case cited by the majority).

An agreement among carriers to establish an exclusive patronage contract system with dual rate levels on the other hand "can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement." (*Isbrandtsen Co. Inc.* v. *U.S. et al.*, 211 F. 2d 51 at p. 56 (U.S. App. D.C.), *Cert. denied* 347 U.S. 990 (1954)). The foregoing was stated in response to the Board's claim that it might allow the agreement to go into effect in advance of formal approval because the basic conference agreement authorizes dual rate system agreement. In the present record the agreements defining local and overland territories, classifying cargo as local initiative, local competitive, and overland, and establishing rate differentials or parity of rates are equally not the "routine arrangements" described in CFR § 222.16, nor interstitial adjustments for

carrying out the approved Agreement No. 8200, but are new agreements. Generally I agree with the majority's reasoning that the practical effect of agreements such as these also puts them well beyond any authorizations to make procedure or "carrying out" arrangements, because they significantly alter the power of the parties to establish rates without interference from each other. Before the agreements, each had power to fix rates from the coast each serves free of interference from the other. After the agreements became effective, each gave up part of its power to fix rates by promises each to the other that they would consult and concur before taking action and by promises regarding the limited conditions under which each had power to decide without consultation. After the agreements, each conference also acquired an expanded authority to influence the rates on the opposite coast, an authority which did not exist before. This is "an entirely new scheme of rate combination." Agreement No. 8200 did not create this alteration of power positions, but only established procedures in Article "FIRST" for bringing it about. Such relinquishment of some power over rates and expansion of power over other rates does not involve rules for the conduct of meetings nor machinery for changing rates and was accomplished by agreements not sanctioned by Agreement No. 8200. The alteration of obligations was created by the subsequent additional new agreements which should have been filed for approval.

I agree further with the majority's reasoning in regard to the concurrence procedure as being covered by Agreement No. 8200 with respect to the initial meeting only, and not to subsequent rate-making decisions. Section 15 of the Act requires that the agreements described be filed immediately.

2. The additional agreements were not filed.

The next question is whether the agreements, not sanctioned by Agreement No. 8200 nor otherwise incorporated therein and therefore subject to being filed immediately, were actually filed, or whether they were filed as a result of the activities of a member of the Commission and the staff in arranging for filing the minutes for information purposes

The Commission's rules in CFR § 222.11 require that the agreements to be filed should be accompanied by a letter "stating that they are offered for file in compliance with section 15 of the Shipping Act, 1916." These rules were not followed. Neither the record herein nor the Commission's files, of which official notice is taken, show any such letter, statement, or offer.

The conferences between officials of Far East and Pacific West-

bound and a member of the Board and the staff do not establish such filing. The subject of filing was never raised, according to the record, and minutes were mailed for many years without any letter of transmittal, nor any request for one. As a conference official testified: "At no time prior to the issuance of the order of investigation in the instant proceedings did the FEC receive any communication from the Commission or predecessors charging that any action of the parties to Agreement No. 8200 was illegal or in any respect improper, or even questioning the legality or propriety thereof." The lack of any communication or question on the subject, absent a requirement on the part of anyone to do so, did not relieve respondents from their responsibility; it is incumbent on respondents to follow the law and to comply with officially published implementing regulations. It is concluded that failure to file as required by the first paragraph of section 15 of the Act has been proven.

3. The additional agreements were not approved.

Approval of the agreements embodied in minutes and required to be filed has not been obtained as required by the second paragraph of section 15 of the Act. Unless filed, there can be no approval of agreements. This issue is likewise covered by the rules in CFR § 222.15 as well as by court decision. The rule stated, as of the time the acts herein occurred: "the practice of assuming approval of the Commission of copies of minutes of meetings * * * before the Commission has formally ruled thereon is no longer sanctioned: * * *."

A court has stated, in response to an argument that since the Board had not disapproved a dual rate system it had in effect approved dual rates, that the agreements "were not approved by the regulatory agency merely because it was silent concerning them and the rates[1] were therefore illegal." *Kempner* v. *Federal Maritime Comm'n*, 313 F. 2d 586 (D.C. Cir. 1963), *Cert. denied* Oct. 14, 1963.

A similar situation was before the courts in connection with the approval of a dual rate contract system as a result of furnishing a written statement to the Board comparable to the furnishing of minutes here, bearing the Board's "received" stamp, as shown in the facts. The Court said: "The statement filed * * * which has appended form contracts with shippers is significantly marked 'received' and not 'approved' as are the basic agreement and its amendments in the Board's file." It was held that since plaintiff's exclusive patronage dual rate system had not been approved, the contract with defendant would not

[1] The reference to "rates" is believed to be erroneous and should be to "agreements". No rates were in evidence in the record, the Commission's report was silent concerning rates, rates were not in issue and were a non-existent factor in the case. What was referred to was probably the agreements creating the dual rates system.

support a claim based thereon, and defendant's motion for a summary judgment was granted. *River Plate and Brazil Conference et al.* v. *Pressed Steel Car Co. Inc.*, 124 F. 2d 88, 91–92; affirmed 227 F. 2d 60 (1955).

Illegality in such case, as in this proceeding, is based on the provision of section 15 of the Act that "any agreement * * * not approved, * * * by the Commission shall be unlawful and agreements * * * shall be lawful only when and as long as approved by the Commission." The agreements evidenced by the minutes have been neither filed nor approved and have been both unlawful from the dates of the meetings at which the actions took place and, with the exception of the concurrence procedure agreement, are not excepted from the provisions of the Act approved July 2, 1890, 26 Stat. 209, 15 U.S.C. 1–7, nor from the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, 28 Stat. 570, 15 U.S.C. 8–11.

The preceding discussion has shown, first, what the respondents actually did pursuant to their approved agreement to establish "machinery," which is herein limited to procedures at meetings and, second, what was done was without sanction in respondents' approved Agreement No. 8200 and therefore was of such a character as to require filing with the Commission of a new agreement labeled as such and accompanied by a request for approval, as suggested for our inquiry by the Court in *Carnation Co.* v. *Pacific Westbound Conference et al.*, 336 F. 2d 650 at pp. 666–667, rehearing denied Id. p. 667, July 30, 1964.

In response to that part of the initiating order of October 26, 1959, requiring a Commission determination "whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of said section 15", it is concluded that Agreement No. 8200 is a true and complete agreement with respect to certain procedures and notifications, but the agreements evidenced by the minutes of their meetings are additional agreements of the type described in section 15 of the Act which were not filed. I do not agree with the majority that they are "supplemental."

4. The additional agreements may not be approved at this time.

The agreements found herein to have been unfiled and unapproved consist of oral agreements reduced to memorandums in the form of abstracts or summaries of minutes of meetings. I agree with the majority's reasoning that the agreements are not before us in a form permitting approval. Preferably, the Commission should review precise agreements that it has down in writing before it and bearing signatures of those bound thereby. Until agreements are filed, representing a true and complete statement of what is to be done by the parties,

the Commission cannot know what it is reviewing. In view of these practical difficulties, it is not desirable to attempt to prejudge whether any true and complete agreement that might be formulated and filed should be disapproved.

5. The overland agreement may not be approved at this time.

The Examiner decided the so-called overland agreement was in violation of section 15 of the Act because it was not a part of Agreement No. 8200, but should be incorporated in Agreement No. 8200 and Agreement No. 8200 as amended should be approved.

One of the conferences' agreements was to continue to establish rates for commodities from the overland territory without any change in previously established differentials ("present overland rate spreads remain status quo * * *") (exhibits 3 and 3A, p. 5). The rate differentials which I believe establish competitive relationships existed in 1925 or before.

Pacific Westbound reduces its rates on commodities originating in overland territory below its rates on commodities originating in local territory to an amount making shippers from overland territory pay, after adding their inland railroad rates, the same amount as they would pay if the shippers used Far East carriers after paying inland railroad charges to ports plus Far East rates from either Atlantic or Gulf of Mexico coast ports.

Under the agreement the competitive relationship between the two conferences, through their power to fix rates independently of each other, has been regulated so as to produce an automatic reduction in overland rates following a reduction in the Far East local rates, in order to preserve existing differentials (Tr. 232, 360).

I agree with the majority's reasoning as to the restraining effect, but cannot on this record determine the effect of operations under the agreement. As with the other additional agreements, the respondents will have to file at some future time their complete agreements affecting overland territories and rates for approval in a proceeding where its lawfulness can be determined under the Act.

6. The unapproved agreements were carried out.

The record shows without denial that all of the decisions taken at meetings were acted on, and there was continuous performance of everything decided to be done at the annual interconference meetings. The actions constituting performance were accomplished directly by the principals through their employees or agents and were accomplished in whole or in part as the circumstances required. Such activity constitutes a carrying out of what has herein found to be agreements that have not been approved by the Commission.

B. Agreement No. 8200 issues.

The Board ordered an investigation to determine whether Agreement No. 8200: (a) was being carried out in a manner which made it contrary to certain standards of section 15 of the Act or (b) operated to the detriment of the commerce, or (c) was in violation of the Act.

The Examiner addressed himself to the issues of the public interest in a hearing to determine whether Agreement No. 8200 should be "granted continued approval," modified, or disapproved.

1. Agreement No. 8200 is not being carried out contrary to section 15.

The issue of whether Agreement No. 8200 was being carried out in a manner which makes is contrary to certain standards of section 15 was decided by the Examiner in the context of the concurrence provision obligations being contrary to the provision in item (1) in the second paragraph of section 15 of the Act, directing the Commission not to approve or continue approval of any agrement between conferences serving different and competitive trades unless each conference maintains the right of independent action.

In this context the Examiner decided the concurrence provision is illegal. Agreement No. 8200, however, provides: "Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of lines should determine that conditions affecting its operations require an immediate change in its tariffs * * *" it may notify the other group. Thereafter, changes may be made "and the action * * * shall not constitute a breach or violation of this Agreement" (*Article SECOND*). I agree with the majority's reasoning in reversing the Examiner. The Examiner's reasoning requires that the "right" (the statutory word) be converted into an obligation or duty to act independently later, after the right is created, in conference operations. This is incorrect. Other parts of the legislative history fully support the inference that Congress was only restricting the authority to approve agreements, and not establishing standards by which to judge operations as the majority states. In this case the operations were also shown to have occurred long before October 3, 1961, when the statute was enacted. If the past operations were unlawful, they must be punished by other means than by declaring illegal an agreement that creates a future right of independent action consistently with the law's command. When the agreed right is created by appropriate provisions, the law is complied with. Respondents' provision complies with the law.

2. Agreement No. 8200 does not operate to the detriment of commerce.

With regard to the remainder of Agreement No. 8200 after excision of the concurrence provision, the Examiner decided that Agreement No. 8200 should be reapproved and should be modified by amendment to incorporate "the complete agreement found herein to be outside the scope of said agreement."

The reapproval of Agreement No. 8200 was not ordered in our initiating order, although disapproval might result from findings under item (2) of our order as described in I above. This result is precluded by our decision that Agreement No. 8200 alone is not being carried out unjustly or unfairly, nor is a detriment to commerce, nor is in violation of the Act; rather, certain other actions and agreements not a part thereof have these results. There are no proofs herein relative to discrimination or detriments to commerce or law violation relative to the performance of the express terms of Agreement No. 8200. The terms of the additional agreements are not to be implied as part of Agreement No. 8200 nor as a performance thereof.

Carnation raised an issue questioning the "need or desirability" of Agreement No. 8200 because of certain conflicts of interest in voting decisions thereunder by the many lines which are members of both Far East and Pacific Westbound. The factors of need and desirability are not standards for approval of agreements. Rather, the Act prescribes that if certain conditions are shown agreements shall be disapproved and the Commission "shall approve all other agreements, modifications or cancellations." The evidence as to conflicts of interest in voting was not developed to the point of proving detriments to commerce, or contrariety with public interest or conflict with the remaining tests. The mere existence of the same members in both conferences was thought to speak for itself, but this is not the case and facts showing how commerce and public interest are adversely affected must be shown as well.

Approval of Agreement No. 8200 was opposed primarily on the assumption that the unfiled agreements are a part thereof, and, because some are unlawful, Agreement No. 8200 must be disapproved. This is not the case; the agreements are separate agreements going beyond procedures, and it will take more than an examination of the defects of present operations, particularly in relation to the overland rate structure, to pass on the questions of approvability.

Possibly this issue was provoked by the wording of the Board's order regarding "true and complete" agreements. If Agreement No. 8200 is not true and complete in the sense of having been supplemented, the majority would have to disapprove it and could not state, "we find insufficient evidence to disapprove Agreement No. 8200," because

Appendix A

the evidence of supplemental agreements is all that is needed. In my view, the other agreements are new and additional, having no direct relation to Agreement No. 8200.

There is no justification on this record for reversing the existing approval of Agreement No. 8200 based on detriments to commerce.

3. Agreement No. 8200 does not violate the Act.

The issue of whether Agreement No. 8200 was in violation of the Act was decided by the Examiner in the context of the use of the initiative and concurrence rights consistently with their additional agreements. These agreements are also separate from Agreement No. 8200. He decided that the "manner" of using the initiative resulted in respondents violating section 16 of the Act, and I agree we should sustain the Examiner in this respect, but such finding is not related to disapproval of Agreement No. 8200. The law is being violated apart from Agreement No. 8200.

C. Exercise of rights as a violation of section 16 of the Act.

I agree with the reasoning of the majority in regard to the use of the rate-making initiative procedures with regard to evaporated milk and that the interconference commitments were a sham as far as the treatment of Carnation was concerned.

As a result of the failure of the conferences to abide by their commitments to not interfere in the other's rate-making rights, respondents, in violation of section 16 of the Act, subjected Carnation as a person, West Coast ports as localities, and the commodity evaporated milk to undue and unreasonable disadvantage. Not getting an otherwise available reduction made the disadvantage "undue." The failure to abide by commitments and the failure to exercise rights when it suited the interests of the parties shown by the failure without satisfactory reason to treat evaporated milk the same as other "70 percent" commodities, made the disadvantage "unreasonable." The agreement was carried out, by the refusal to put evaporated milk on the initiative list in spite of eligibility, in a manner which made it unfair as between east and west coast carriers, shippers, and ports, and in a manner discriminatory to Carnation.

IV. Facts

1. Far East and Pacific Westbound, each on behalf of its members as common carriers by water in foreign commerce, are parties to an agreement made November 5, 1952, by which they agree to establish from time to time "rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates," excepting rates on 12 specified commodities. The agree-

Appendix A

ment stipulates the procedures for subsequent meetings or interconference interchanges of information to accomplish the rate-regulating objectives and to reach decisions.

2. Before the agreement was signed, there had been a discussion of the subject at a meeting on January 16, 1952, between the Chairman of the Far East Conference; the Secretary-Manager of Pacific Westbound; a member of the Board, our predecessor agency; and two employees on the staff of the Board (exhibit 8, par. 16, pp. 9–10). At this meeting the Board member told the group, "that he was very much interested in seeing the two Conferences form a joint agreement and that he hoped it could be finalized without delay." One of the staff members said he "and at least one member of the Board would like to see a joint agreement put into effect * * *" (exhibit 8, par. 16–17, pp. 9–10).

3. A draft agreement was prepared and personally delivered on September 4, 1952, by Far East's Chairman to the Board's staff, with a request "for an informal review of the agreement and opinion as to whether it would be recommended" by the regulations office for approval (Id, par. 21, p. 11). The regulations office on September 18, 1952, sent Far East written informal comments on the draft (Id, par. 22, p. 12). Another revised draft was prepared and made final by execution by the parties on November 5, 1952 (Id, par. 25, p. 12). On the same date a copy of the executed agreement was transmitted to the Board with a request for approval under section 15 of the Act, and approval followed as evidenced by a notation on the copy in the record, "Approved by Order of FMB dated December 29, 1952" (exhibit 13).

4. Obligations relative to performance of later actions under Agreement No. 8200 are as follows:

> *First:* As promptly as possible after the approval of this agreement by the Federal Maritime Board, the parties shall hold a meeting which is hereinafter referred to as the "initial meeting." The initial meeting shall be held at a time and place to be mutually agreed upon by the parties hereto. If, however, prior to the 30th day after such approval the parties hereto shall not so have mutually agreed upon the time and place for the holding of the initial meeting, said initial meeting shall be held on the 40th day after such approval at the Fairmont Hotel in the city of San Francisco, Calif.; and if such 40th day shall fall on a Saturday, Sunday or legal holiday, said meeting shall be held on the second business day thereafter, at the same place. Such meeting shall be attended by representatives of the PACIFIC LINES and of the ATLANTIC/GULF LINES. All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the PACIFIC LINES, acting as a group, and of the ATLANTIC/GULF LINES, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates. The initial

meeting shall make rules, not inconsistent with the provisions of this agreement, for the conduct of all meetings to be held hereunder, and for the the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting.

Second: Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by air mail, and a summary of the facts which justify the changes on said short notice. Forty-eight hours, or 72 hours, after the giving of such notice, dependent upon the medium by which such notice shall have been given, the notifying group may make such changes as stated in said notice and the other group may, at the end of 48 hours, or at the end of 72 hours, as the case may be, after the giving of such notice, make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or violation of this agreement. The parties shall, however, promptly give to the governmental agency charged with the administration of section 15 of the Shipping Act, 1916, as amended, copies of any notices and information with respect to any changes in tariffs given or made as provided for in this *Article Second.*

5. The remaining six out of eight articles deal with (a) filing copies of proceedings with the Board, (b) admission of new parties to and termination of membership in conferences, (c) method of giving notices, (d) the effective date of the agreement, (e) expenses of representation, and (f) termination of the agreement.

6. Since the agreement was signed, the parties have held 13 meetings.

7. Insofar as rates and the subjects of this proceeding are concerned, the members of respondent conferences met and adopted resolutions or collectively agreed to a common course of action at meetings held at least annually since 1953, as evidenced by written minutes which were furnished to the Board and the Commission and are now in the Commission's files, as follows:

January 26–30, 1953. Minutes stamped "Received 11:15 a.m., February 24, 1953. Regulations Office, FMB."

September 22–25, 1953. Minutes stamped "Received 12:30 p.m., October 12, 1953, Regulations Office, FMB."

September 10–14, 1954. Minutes stamped "Received 12:05 p.m., October 4, 1954. Regulations Office, FMB."

April 30 to May 5, 1955. Minutes stamped "Received 1:30 p.m., May 31, 1955. Regulations Office, FMB."

May 7–10, 1956. Minutes stamped "Received 2:15 p.m., May 28, 1956. Regulations Office, FMB."

May 6–9, 1957. Minutes stamped "Received 9:45 a.m., June 6, 1957. Regulations Office, FMB."

May 5–18, 1958. Minutes stamped "Received 1:30 p.m., June 16, 1958. Regulations Office, FMB."

May 4–7, 1959. Minutes stamped "Received 10:45 a.m., June 23, 1959. Regulations Office, FMB."

March 7–10, 1960. Minutes stamped "Received 2:30 p.m., April 15, 1960. Regulations Office, FMB."

May 8–11, 1961. Minutes stamped "Received 1:05 p.m., June 26, 1961. Office of Regulations, FMB."

May 2–4, 1962. Minutes stamped "Received 11:30 a.m., June 7, 1962. Bureau of Foreign Regulation, FMC."

(*Note:* As of the time of hearings in May 1962, only the foregoing meetings had occurred.)

May 15–17, 1963. Minutes stamped "Received 9:45 a.m., June 17, 1963. Bureau of Foreign Regulation, FMC."

April 13–17, 1964. Minutes stamped "Received 10:05 a.m., May 25, 1964. Bureau of Foreign Regulation, FMC." (See exhibit 3, 3A for compendium issued July 15, 1956.)

At joint meeting No. 5 in May 1956, the following action was taken: "At the close of each joint meeting the spokesmen for the two conferences shall agree upon that portion of the minutes of that meeting which shall become a part of the memorandum of decisions". The memorandums of decisions are exhibits in this record. (See exhibits 3 and 3A, p. 7, item 8.)

8. The record does not show that the minutes furnished during the years involved in this proceeding, 1953–1959, or the "memorandums of decisions" were accompanied by any letter of transmittal, nor do the Commission's files, of which I take official notice, show any such letter, or any statement that the minutes or abstracts were offered for file in compliance with section 15 of the Act, or any request for Commission approval thereof. The Commission's records show no referral to it for approval nor was any express approval of the minutes given. (See exhibit 8, p. 13, par. 27, and p. 14, par. 32, for testimony re informational nature of submission.)

9. Evidence of the Board's knowledge about the conferences' actions is contained in a letter from the Chairman of the Board to the Director of the Freight Traffic Department of the California Manufacturers Association, dated March 16, 1953, stating:

> * * * Information now before us shows that while no agreement with respect to particular rates was reached at the initial meeting, such meeting did result in mutual understandings on certain basic policies, operational patterns and procedural mechanics and that committees were named to work out details to accom-

plish the matters on which there was agreement by the members and to study and report on particular subjects to be given consideration at future meetings. Both conferences have now agreed that when comparing East Coast and West Coast rates, the handling charges, tolls and wharfage paid by the cargo will be included. In other words the total freight rate to be compared will be computed on the basis of the ocean freight rate as per the tariff plus any handling charges, tolls or wharfage which are for account of the cargo.

As was expected there was a wide divergence of views with respect to the matter of rates as between the two conferences on cargo classed as "local competitive." Further study is to be made of this problem and committees have been designated by the two conferences for this purpose. They are to meet in Chicago the early part of April. It is worthy of note that in agreeing to this, the Pacific Westbound Conference announced that it reaffirmed its views that the principle of a basic spread be recognized between Atlantic/Gulf and Pacific rates in favor of the Pacific and that it initends to continue discussion of this subject for final joint determination. (Exhibit 8, item 5, p. 1.)

10. At all times from December 31, 1948, to the present, the Code of Federal Regulations contained rules regarding filing of agreements. (See 1949 Edition—Code of Federal Regulations, containing a codification of documents of general applicability and future effect as of December 13, 1948. Title 46—Shipping. Ch. II—United States Maritime Commission. Part 222—Statements and Agreements Required to be Filed. See also Cumulative Pocket Supplement for Use during 1953; continued in the 1953 revision containing such codification of documents as of Dec. 31, 1953, under the same code sections and the Cumulative Pocket Supplement Revised as of Jan. 1, 1957; and continued in the current revision as of Jan. 1, 1958, including the Pocket Supplement as of Jan 1, 1964.)

11. A typical format of minutes and proof of the action taken on territorial division and initiative authority on rate making is as follows:

a. Minutes of Joint Meeting No. 1; Pacific Westbound Conference—Far East Conference; Held at the Santa Barbara Biltmore, Santa Barbara, California

January 26-29th. 1953.

Mr. Winston J. Jones, Joint Chairman, called the meeting to order at 2:30 p.m. and extended a warn welcome to both conferences and expressed the hope that the meeting would be productive in finalizing the details regarding the joint agreement.

* * * * * * *

DOCKET SUBJECT NO. 4—DEFINITION OF TERRITORIES; LOCAL AND OVERLAND

It was agreed that local and overland territories shall be as follows:

Appendix A

Local Territories

Atlantic/Gulf:

Maine	Pennsylvania	Florida
New Hampshire	Delaware	Alabama
Vermont	Maryland	Mississippi
Massachusetts	Virginia	Louisiana
Rhode Island	West Virginia	Texas
Connecticut	North Carolina	District of Columbia
New York	South Carolina	
New Jersey	Georgia	

Pacific:

Washington	Idaho	Nevada
Oregon	Utah	British Columbia
California	Arizona	Alberta
Wyoming	Montana	Saskatchewan

Overland Territory

That territory lying between the two local zones.

DOCKET SUBJECT NO. 5—CLASSIFICATION OF CARGO

(a) *Local Initiative:* It was agreed that 70 percent of the total annual movement of any one commodity of an agreed list of commodities would establish the initiative rate-making authority.

(b) *Local Competitive:* It was agreed that all cargo originating in local territories, except for open rate items, that have not been classified as initiative, is local competitive.

(c) *Overland Cargo:* It was agreed that overland cargo is that cargo originating in agreed overland territories.

* * * * * * *

DOCKET SUBJECT NO. 13—MECHANICS OF THE AGREEMENT (CONTINUED)

7. CONCURRENCES

(a): Where a concurrence is required and where a request for concurrence for adjustment in a rate is made by either conference, it is agreed that such concurrence shall be sent and replied to by telegraph. In the event no reply is received by the conference applying for such concurrence within 5 days after the original application is dispatched, Sundays and holidays excluded, it is agreed that concurrence shall be considered automatically granted.

(b): Requests for concurrence shall contain full data regarding the commodity in question, as follows:

1. Nature of commodity and use.
2. Export packing.
3. Weight and measurement per package and cubic feet per 2,000 lbs.

Appendix A

4. Invoice value at shipping point.
5. Point of origin.
6. Rail rates—both coasts.
7. Estimated annual tonnage.
8. Period of movement.
9. Necessity for rate and reasons and any other data that will be of assistance in concluding the subject under discussion.

(c): Whenever after full and reasonable consideration of any rate subject in which concurrence is requested, one or the other conference finally declines such concurrence, renewal of requests can only be made after satisfactory information is supplied. It is distinctly understood that the conference refusing concurrence shall in their refusal clearly explain the reason for so refusing and explain in detail the further information required to give the matter further consideration.

* * * * * * *

(Meeting No. 1, supra.)

Received 11:30 a.m.
Oct. 4, 1954.
Regulation Office.
Federal Maritime Board.

b. MINUTES OF JOINT MEETING NO. 3: PACIFIC WESTBOUND CONFERENCE AND FAR EAST CONFERENCE; HELD AT BANFF SPRINGS HOTEL, BANFF, ALBERTA, CANADA

September 10–14, 1954.

Mr. K. H. Finnesey, Joint Chairman, called the meeting to order at 11:00 a.m., September 10, 1954, and extended a cordial welcome to the members of both conferences.

DOCKET SUBJECT NO. 1—ROLL CALL

The secretary called the roll and reported all members of Pacific Westbound Conference present except Knutsen Line and Pacific Far East Line, Inc., and all members of Far East Conference represented except Intercontinental Marine Lines, Inc., Kawasaki Kisen Kaisha, Ltd., Kokusai Line, Shinnihon Steamship Co., Ltd., States Marine Corporation, and Waterman Steamship Corporation.

* * * * * * *

DOCKET SUBJECT NO. 4—LOCAL COMPETITIVE CARGO

1. Spread in Rates—Definition of Local Competitive Rate Basis

* * * * * * *

Far East Conference Position: That the principle of parity in establishing the level of local competitive rates is fundamental.

Appendix A

Position of Both Conferences: Both conferences agree that the Ocean Rate Basis used for comparative purposes between the Atlantic/Gulf and Pacific shall comprise the total ocean freight, plus handling charges, tolls or wharfage paid by the cargo through either Atlantic, Gulf or Pacific ports.

Both conferences agree to continue their efforts to reconcile differences in their fundamental positions as stated above.

12. Other actions taken at meetings cover the definition of the "local ocean rate basis" and specifying 17 commodities subject to rate-making initiative by Far East and 20 commodities by Pacific Westbound, stating differentials in rates between the two coasts, procedures for changing rates, agreeing not to divulge information in regard to changes in rates, creating a duty to use uniform minimum bill of lading charges, and a variety of agreements on rate changes and classifications (exhibits 3, 3A).

13. Rate-making initiative was defined as follows:

JOINT MEMORANDUM OF DECISIONS

1st Rev., page 5.
Issued May 9, 1960

ITEM NO. 3—DEFINITION OF LOCAL OCEAN RATE BASIS (CONTINUED)

(c) *Rate-Making Initiative.*

(Joint Mtg. No. 4—May 1955.)

The term "rate-making initiative" as expressed herein, when delegated to either conference shall be limited to:

1. Measure of the rate.
2. Effective date.
3. Expiry date.
4. Period of quotation or forward booking.
5. Establishment or termination of contract rates.

The conference having the rate-making initiative on a commodity may not change the rate basis, terms and conditions, or open or close the rate of that commodity without concurrence from the other conference.

(Joint Mtg. No. 5—May 1956.)

Rate-making initiative shall be confined to the commodity named and does not include the right to interpret additional items to the initiative commodity without concurrence by the other conference.

(Joint Mtg. No. 9—March 1960.)

Once concurrence has been given for the opening of a rate, the conference having the rate-making initiative may extend the expiration date of the open rate authorization without the further concurrence of the other conference.

4—DEFINITION OF OVERLAND RATE BASIS

(Joint Mtg. No. 1—January 1953.)

Present overland rate spreads remain status quo, pending outcome of the overland rate study by the two conferences. (For stated positions of the conferences on question of overland rates, see minutes of joint meeting No. 1, docket subject 5(c).)

14. As a result of decisions made pursuant to the conferences' undertaking evidenced by the actions at interconference meetings, the following events have occurred:

a. Intervenor Carnation Co. had before Pacific Westbound in a letter dated November 11, 1957, a proposal to restore the lower rates on evaporated milk in effect before May 1, covering transportation from West Coast ports to the Philippines (exhibit 19, p. 1).

b. In 1957, 90 percent or more of the total annual movement of evaporated milk was from the Pacific Coast (Tr. 210, 306), but Carnation did not know that Pacific Westbound was entitled to have the rate-making initiative on this item. Conference meetings in 1957 and 1958 show shippers' requests for "a reduction in the rate for evaporated milk." Pacific Westbound expressed willingness to reduce rates for transportaton of evaporated milk to the Philippines (exhibit 19, p. 4, item (d); 5; 12).

c. Far East refused to concur or agree to giving Pacific Westbound rate-making initiative on evaporated milk (exhibit 19, p. 12), and the last refusal to adjust was communicated to Carnation on May 12, 1958 (exhibit 19, pp. 14–15) (Tr. p. 255).

d. Pacific Westbound at joint meeting No. 7 in May 1958 agreed to withdraw its request for concurrence to reduce local and overland rates on item 1350—evaporated milk (exhibit 19, p. 13).

15. Far East and Pacific Westbound establish freight rates for the transportation of commodities in foreign commerce from U.S. Atlantic, Gulf of Mexico, in the case of Far East, and Pacific Coast ports, in the case of Pacific Westbound, to ports in Japan, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, the Philippine Islands, Vietnam, and Cambodia (exhibit 8, p. 1, item 2). Pacific Westbound also serves Thailand (exhibit 12, p. 1).

FEDERAL MARITIME COMMISSION

No. 872

JOINT AGREEMENT BETWEEN MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

ORDER

Full investgation in this proceeding having been had, and the Commission on this day having made and entered of record a report stating

Appendix A

its conclusions and decisions thereon, which report is hereby referred to and made a part hereof, and having found that the supplementary agreements affecting overland rates, concurrence procedures, and the placement of items on the initiative list constitute unapproved agreements which are required to be filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916,

Therefore, It is ordered, That the respondents, Far East Conference and Pacific Westbound Conference, cease and desist from carrying out such supplementary agreements until filed with and approved by the Commission.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX B

ADMINISTRATIVE PROCEDURE

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Appendix B

Section 15, Shipping Act, 1916, as amended, 75 Stat. 763, and as further amended, 78 Stat. 148 (46 U.S.C. § 814):

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or co-operative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between

carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and re-admission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Appendix B

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

Supreme Court, U.S.
FILED
AUG 24 1971

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-130

PACIFIC WESTBOUND CONFERENCE and FAR EAST CONFERENCE,

Petitioners,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, CARNATION COMPANY, BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS and THE PORT OF NEW YORK AUTHORITY,

Respondents.

Brief of Carnation Company Opposing Petition for Certiorari

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INDEX

	Page
Why The Case Should Not Be Reviewed	1
Statement of the Case	5

AUTHORITIES

CASES	Pages
Carnation Co. v. Pacific Westbound Conference, 383 US 213	4, 5, 6, 7, 8
Carnation Co. v. Pacific Westbound Conference, 336 F2d 650 (Cir 9)	8
Consolo v. FMC, 383 US 607	4

RULES	
U S Sup. Ct. Rules, Rule 19	1

STATUTES	
Pub. Law 89-554 (28 USC § 2344)	3
Review Act, 1950, § 4 (5 USC § 13034)	3
Shipping Act. 1916, § 15 (46 USC § 814)	2, 3, 4, 6, 7, 9

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Petitioners,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, CARNATION COMPANY, BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS and THE PORT OF NEW YORK AUTHORITY,

Respondents.

Brief of Carnation Company Opposing Petition for Certiorari

Respondent Carnation Company, opposing the issuance of the writ of certiorari petitioned for, respectfully shows:

WHY THE CAUSE SHOULD NOT BE REVIEWED

The petition fails to show a case that falls within Rule 19 or to show any special or important or any reason for review by this Court.

The Rule-making Claim

The first two questions said to be presented and the matters urged in this connection come to this: The Federal Maritime Commission decision in its Docket No. 872 (affirmed by the Court of Appeals decision here sought to be reviewed) deprived the petitioners (and their members) of the exemption from the antitrust laws under Shipping Act of 1916 § 15, not by the decisional (quasi-judicial) process of construing FMC Agreement No. 8200 as not authorizing the agreements for the "initiative" and "concurrence" rules for rate making but by a process of setting up and making retroactive a new rule (standard) without complying with the Administrative Procedures Act for rule-making. There are two short answers: (1) The Commission did not set up a rule and (2) it is not open to the petitioners to claim that it did.

The respondents entered into and carried out two agreements affecting the making of rates by their members,—the setting up of an "initiative" list of commodities and the agreement that neither conference would change the rates for any commodity not on its initiative list without the concurrence of the other conference,—without submitting these agreements for approval or approval of them under Shipping Act, 1916, § 15 (46 USC § 814). These were not agreements for *jointly agreeing* on rates,—the petitioners always claimed and the Court below held that this was provided for in Agreement No. 8200,—but gave each conference a veto power over any change by the other of its own rates so that it could be bound to a rate with which it no longer agreed, as in this very case with PWC and the increased rate on evaporated milk. From the beginning of the Commission's inquiry in its Docket No. 872[1] through its decision, one of the issues was "Did Agreement No. 8200 authorize the conference to make a side agreement for this veto power?" The Commission decided "no" *as a matter*

1. The holding was responsive to the inquiry whether No. 8200 "is a true and complete agreement between the parties". The Report of the Commission say this is the "first issue". The holding was that it was not; that outside of it were the agreements for "initiative" and "concurrence" not authorized by it.

of construction of Agreement No. 8200. It was not rule-making. The determination of the Commission was:

> "Thus we hold that the supplementary agreements relating to the rate-making initiative * * * * the concurrence procedures * * * are without sanction in the basic Agreement No. 8200 * * *"[2]

The determination of the Court was that "we agree with the Commission that the supplementary agreements are without sanction" i.e. in Agreement No. 8200. The Court made the very distinction between an agreement allowing joint rate making and one surrendering the right of independent action which Congress made in the 1961 amendment of § 15 of the Shipping Act, 1916.

It is not open to petitioners to claim that the Commission was doing any general rule-making. The Commission action was brought to the Court of Appeals for the Fifth Circuit for review under the Review Act of 1950 § 4 (5 USC § 1034), replaced by Pub. Law 89-554 (28 USC § 2344). Both provided that review should be on petition and that the petition should state, among other things, "the grounds on which relief is sought". The petition in this case (set out in Appendix A hereto) did not state as a ground for relief that the Commission action had been rule-making without compliance with the Administrative Procedure Act. No such question was before the Court of Appeals or decided by it or can now be urged as a ground for finding that it was in error.

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2. The Petitioners, correctly, in their petition to review the Commission's decision (see App. A, hereto, Part III, par. 1 and 2) took the position that the Commission, in its original Report, held "initiative" and "concurrence" were not authorized by Agreement No. 8200, *without* any holding that No. 8200 did not authorize joint rate-making and that the holding that No. 8200 did not authorize joint rate-making came only with the "clarification" of November 1, 1965 *"contrary* to the Opinion and Order as originally issued on July 30, 1964". The Report shows that the Examiner found that there were these *supplementary* agreements, that the conferences excepted and argued they "are within the contemplation of the joint agreement" and the Commission said "We disagree with respondents". It held that under earlier Commission decisions they did not constitute "routine actions" or "day-to-day interstitial workings under the agreement" which did not require separate filing and approval.

Remand for Redetermination

There was no occasion to remand to the Commission to again determine what it already had determined,—to make a decision which already had been so made that all the Court of Appeals had to do was agree and affirm. The Commission held that whatever else Agreement No. 8200 did or did not do it did not authorize the agreements for the initiative list and concurrence requirement for change of rates on non-initiative items.[2] This was a determination which this Court, *with Agreement No. 8200 and the decision of the Commission before it*, held in *Carnation Company v. Pacific Westbound Conference*, 383 US 213 the Commission could make. If the Commission could make this decision under Agreement No. 8200 the Court of Appeals, if it agreed, could affirm.[3] The Court of Appeals, having determined as matter of law,—as a matter of construction,—that Agreement No. 8200 allowed joint rate making but not an agreement depriving each conference of the power of independent action on non-initiative items, could not remand so that the Commission could disregard this holding and make a different determination.

Modification of Agreements Nos. 17 and 57

Finally, as an independent ground for holding that the agreements for the initiation list and "concurrence", until filed and approved, were illegal under Shipping Act of 1916, § 15 the Court held that complete control over the rates of their members was given to each conference by their "organic conference agreements", FMC Agreements Nos. 57 and 17, and that the supplementary initiative and concurrence agreements, without Commission approval, unlawfully affect their organic agreements, — deprive each conference of the right of independent action given to it by its own organic agreement. This is sufficient to sustain the Commission holding that the supplementary agreements were "modifications", required filing and approval to be lawful (Shipping Act, 1916, § 15 par. 1) and were unlawful under § 15 with-

3. Indeed, under *Consolo v. FMC*, 383 US 607, was required to affirm.

out this. The petition does not in any form attempt to deal with this separate and sufficient ground for the Court's holding.

STATEMENT OF THE CASE

The petition's statement is inadequate.

The material for the statement of the case appears in the record herein of the Court of Appeals for the Fifth Circuit and in the record of this Court in *Carnation Company v. Pacific Westbound Conference,* 383 US 213, Oct. Term, 1965, No. 20. These are interdependent cases, part of the same controversy. Under the doctrine of "primary jurisdiction" and the decision in *Carnation Company v. Pacific Westbound Conference,* 383 US 213, above, this case is a part of the action which this Court in *Carnation* remanded to the District Court for trial after conclusion of this case.

The petitioning "conferences are associations of shipping companies that *establish rates for their respective members* pursuant to agreements approved by the Federal Maritime Commission[4]" (*Carnation,* 383 US 213, 215), Agreement No. 57 for Pacific Westbound Conference (PWC) whose members served the Far East from the West Coast and No. 17 for Far East Conference (FEC) whose members served the Far East in a competing trade from the Atlantic and Gulf Coasts. On November 5, 1952 the members of these conferences entered into FMC Agreement No. 8200 which was approved by the Commission on December 29, 1952.[5] Thereafter, in May 1955 and May 1956, the conferences entered into supplementary agreements setting up an "initiative list" of items for each conference on which that conference, acting alone under its organic Agreement No. 17 or No. 57, could fix,—raise or lower,—rates and agreeing that the rates on items *not* on its initiative list could not be changed by one conference acting alone for its members under its organic agreement but

4. References to the Commission include its predecessors.

5. Called in *Carnation,* 383 US 213, 223 fn 6 "the 1952 agreement for consultation" and held by the Court below to authorize the two conferences to act jointly and agree on rates.

could be changed by one conference for its members only with the concurrence of the other conference.[6]

Effective May 1, 1957 the PWC rate for evaporated milk from the West Coast to the Philippine Islands was increased by $2.50 per ton. Carnation Company was a shipper of evaporated milk to the Philippines from the West Coast. In November 1957 it requested PWC to return to the old rate by reducing the rate by $2.50. PWC, as the petition states (p. 5), voted to grant the request but since it did not have the initiative on evaporated milk, agreeably to the 1955 and 1956 supplementary agreements, it requested the concurrence of FEC. Concurrence was declined by FEC, PWC submitted to this veto and, accordingly, Carnation's request was declined by PWC which represented to Carnation that this was the decision of "the members of this Conference".[7]

On October 26, 1959 the Commission, on its own motion, instituted its Docket No. 872 an investigation, among other things, into "whether said Agreement No. 8200 is a true and complete agreement of the parties". Carnation's petition to intervene was granted September 8, 1960. In the course of the investigation Carnation learned about the supplementary agreements for the initiative list and concurrence and the real reason why its request of November 1957 for the removal of the increase in the rate on evaporated milk to the Philippines had been declined by PWC. On the basis of what it learned it, on December 5, 1962, instituted its action under the antitrust laws in the United States District Court for the Northern District of California, So. Div., No. 41153, against PWC, FEC and their members which so far has resulted in this Court's decision in *Carnation Company v. Pacific Westbound Conference,* 383 US 213, 932.

Meanwhile on October 3, 1961 Shipping Act, 1916, § 15 had been amended to make clear the distinction between, and the

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6. See petition p. 4 fn 5. There was provision that if one conference changed the other could also change in order to maintain a prior differential but this case is not concerned with such changes.

7. It would seem that this misstatement was inspired by the secrecy agreement to which the Court below refers in its opinion.

different treatment that should be accorded to, agreements between conferences to agree on rates and agreements which go beyond this and give one conference a veto power over rates of another conference and so deprive a conference of the right of independent action. The amendment provided (among other things) that no agreement between conferences should be approved unless each conference "retains the right of independent action". This is a Congressional determination of the difference between an agreement that parties *can* act jointly in fixing rates and one which prohibits a conference from acting alone and requires that conferences *must* act jointly.

Carnation, in its action for damages against the conferences and their members, No. 41153, set out the nature of the traffic involved, the formation of the conferences and the function of PWC under its organic Agreement No. 57 in fixing rates for its own members, the making of Agreement No. 8200 and the later making of the secret supplementary and unapproved agreements for the initiative list and the necessity for concurrence, what it had learned in the proceedings in the Commission's Docket No. 872 and that it had been unlawfully overcharged $2.50 per ton on shipments of evaporated milk as a result of the supplementary initiative list and concurrence agreements which were illegal under the Sherman Act and not exempted because not filed and approved under Shipping Act, 1916, § 15.[8] The issue of illegality because of non-approval was clearly tendered. Equally clearly if the supplementary agreements were exempt from the Sherman Act for any reason Carnation had no case and dismissal was proper.

The Commission learned of Carnation's action No. 41153, intervened and, with the defendants, moved to dismiss. It presented, in support of its motion, Carnation's intervention in

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8. The complaint was before the Court in *Carnation*, 383 US 213 and the holding of this Court was that it was sufficient to charge violation of the antitrust laws. The petition here (pp. 6, 7) concedes that this Court held a claim for relief was stated unless an exemption under § 15 could be found.

Docket No. 872 and *Agreement No. 8200 in full text*. It is beyond question that from then on the Commission's proceedings in Docket No. 872 and the Courts' proceedings in *Carnation Company v. Pacific Westbound Conference* were in full view of each other. It is beyond question that when this Court decided *Carnation*, 383 US 213 and 932 it had Agreement No. 8200 and the supplementary agreements before it.

The District Court granted the motions and dismissed. Carnation appealed to the Court of Appeals for the Ninth Circuit. Before that appeal was determined the Initial Decision of the Examiner in Docket No. 872 was rendered. It was called to the attention of the Court of Appeals for the Ninth Circuit and was referred to in the Court's opinion (336 F2d 650). The Court noticed that if the Commission ruled in favor of the action taken by the conferences "no antitrust proceedings would be in order." It affirmed the dismissal.

After the decision of the Court of Appeals the Commission decided Docket No. 872. In making its decision it had before it the Court of Appeals' decision. That decision is referred to in the opinion of Commissioner Patterson.

This Court granted certiorari to review the decision of the Court of Appeals for the Ninth Circuit. The decision of the Commission in Docket No. 872 and its decision of November 1, 1965 on petitions for clarification, both had been rendered before *Carnation Co. v. PWC* was argued in this Court and both were before it when it rendered its decision. The opinion of Mr. Chief Justice Warren specially refers to what the Commission decided (p. 223); that the FMC had "concluded that its approval of respondents' 1952 agreement [No. 8200] did not cover the implementation of the subsequent agreements which are the basis of petitioner's treble-damage complaint." Agreement No. 8200 in full text was before this Court and the reversal of dismissal of Carnation's action, at the least, is a holding that *so far as the terms of No. 8200 are concerned* they did *not* preclude the FMC ruling as to the subsequent agreements; that it could be held, as the

Court of Appeals for the Fifth Circuit held, that the *terms of No. 8200* did not authorize the supplementary veto arrangement.

Neither the Commission nor the courts were under any misapprehension as to what was going on. When this Court reversed the Ninth Circuit it necessarily held that under the terms of No. 8200 as matter of law the Commission could decide as it did decide; that the terms of No. 8200 did not authorize the supplementary agreements because if No. 8200 authorized them they were exempt, Carnation's complaint did not state a claim, its antitrust action could not be sustained and the Court of Appeals and District Court should have been affirmed, not reversed. It did no remand for trial, as it at first stated should be done, because after its opinion was filed it learned of the proceedings for review and directed that the case be held until the Commission's decision was final. Since the Court below affirmed, there is nothing further for the Commission to do.

CONCLUSION

There is nothing to the attempted point that the Commission having decided specific issues raised by contending parties, in a proceeding that as to these issues had become adversary, it was exercising rule-making power.

This Court has in substance already decided that the Court of Appeals could affirm the Commission.

The supplementary agreements were unapproved modifications of the conferences' organic agreements and unlawful under the plain wording of Shipping Act, 1916, § 15.

It is respectfully submitted that the petition should be denied.

San Francisco, California, August 16, 1971.

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Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT[1]

Pacific Westbound Conference and Far East Conference, Petitioners, v. United States of America and Federal Maritime Commission, Respondents.	No. 20634

PETITION FOR REVIEW

Pacific Westbound Conference (PWC) and its members lines, and Far East Conference (FEC) and its member lines, petition this Court to review an Opinion and Order of the Federal Maritime Commission dated July 28, 1965 as "clarified" and made final by the Commission on November 1, 1965. Said Opinion and Order is entitled, "Docket No. 872, Joint Agreement between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference". A true copy of said Opinion and Order is attached to this Petition as Exhibit A,[2] and a true copy of said "clarification" to the Opinion is attached as Exhibit B.[2] Said Opinion and Order is directed against petitioners and their member lines.

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1. Transferred to the Court of Appeals of the Fifth Circuit on application of the Federal Maritime Commission agreeably to 28 USC § 2112 (a).

2. Omitted here. They appear in the printed record of the Court of Appeals at pp. 92 and 174 and the Commission's original Report and the opinion of Commissioner Patterson are in Appendix A to the Petition for Certiorari.

I. *Jurisdiction and Venue*

This Court has jurisdiction to review this Report and Order of the Commission pursuant to Section 2 of the judicial Review Act of 1950 (5 U.S.C.A. § 1032). Venue is in this Court under Section 3 of said Act (5 U.S.C.A. § 1033).

II. *Nature of the Proceedings*

1. The instant Opinion and Order of the Commission was issued after an investigation instituted by the Commission's predecessor, the Federal Maritime Board. on October 26, 1959 (Docket No. 872). That order of investigation recited that PWC's and FEC's member lines had entered into an agreement (No. 8200) approved by the Board under Section 15 of the Shipping Act, 1916, (46 U.S.C. § 814). The Order further recited that the parties "pursuant to that agreement act jointly for the purpose of establishing the rates and rules and regulations relating to the transportation by them. . . ." The purpose of the investigation was to "determine whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of [Section 15 of the Shipping Act, 1916]." or whether, on the other hand, there were subsidiary unfiled agreements between the parties that should have been filed with the Commission.

2. Agreement 8200, which was introduced as an exhibit in the investigation, provided that the purpose to be accomplished thereby was to assure stability of ocean rates to the Far East from the East and West Coasts of the United States. The parties agreed that "it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates. . . ."

3. On August 30, 1963 the Commission's Presiding Examiner issued his opinion and recommended decision. This decision in no way questioned the right of the parties to the Agreement 8200 to act jointly in the making of ocean freight rates. The entire discussion and decision concerned the "rules and regulations", adopted pursuant to Agreement 8200 by the parties, that dealt with the

manner and procedure under which the parties would agree on rates. The Examiner concluded that certain of these rules and regulations should have been filed separately with the Commission as agreements subject to Section 15 of the Act.

4. On July 30, 1964, this Court, in an opinion by Judge Pope rendered in an appeal in a civil action concerning this same Agreement 8200, twice stated that Agreement 8200 as approved by the Federal Maritime Board obviously authorized the parties to the agreement to act jointly (i.e., agree on) in fixing ocean rates. The Court stated:

> "It is plain that the arrangement provided for by agreement No. 8200 contemplated joint action in the establishment of rates. It recited that for the accomplishment of the purpose of this agreement 'it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates.'
>
> * * * * *
>
> "We have noted that it [Agreement No. 8200] expressly provided for and obviously contemplated the establishment of rates by agreements between both conferences. This approved agreement expressly provided that rates should be determined only by a concurrence of the two conferences each acting as a group and in accordance with the procedures prescribed by its conference agreement with respect to the establishment or change of rates."
>
> (*Carnation Company v. Pacific Westbound Conference*, 336 F.2d 650 at 665 (1964))

5. On July 28, 1965, the Commission issued its Order and Opinion in Docket No. 872. The Commission held:

> "that the various supplementary agreements affecting overland rates, the concurrence procedures, and the placement of items on the initiative list, constitute unapproved agreements which should have been filed with us for action pursuant to section 15; and not having been so filed and approved the parties to Agreement No. 8200 are hereby ordered to cease and desist from carrying them out;" (Exhibit A, p. 17)

The Commission did not appear to question the rights of the parties to Agreement 8200 to act jointly in making ocean rates. To the contrary, it stated:

> "By the terms of the agreement, the parties thereto agree to establish from time to time 'rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates,' . . . . The agreement further stipulates the procedures for subsequent meeting or inter-conference interchanges of information to accomplish the objectives of the agreement." (Exhibit A, p. 2)

At these later meetings, the Commission found, the parties entered into the "supplemental" agreements which had, according to the Commission, not been filed pursuant to Section 15.

6. On November 1, 1965 the Commission "clarified" its Opinion and Order in Docket 872 as follows:

> ". . . there exists no approved agreement which permits joint rate action between PWC and FEC". (Exhibit B, p. 3)

Petitioners hereby seek judicial review of the Commission's determination that Agreement 8200 as approved by the Federal Maritime Board did not permit any form of joint rate action between PWC and FEC members.

III. *Grounds on Which Relief Is Sought*

Relief is sought from the Opinion and Order of the Commission as "clarified" as it relates to the right of the parties to take joint rate action on the grounds that:

1. The Commission's Opinion and Order as "clarified" are manifestly in error and contrary to the plain meaning of Agreement 8200, insofar as the Commission determined that Agreement 8200 does not authorize PWC and FEC members to act jointly in making ocean rates.

2. The Opinion and Order as "clarified" are contrary to the interpretation placed on Agreement 8200 by this Court in *Carnation Company v. Pacific Westbound Conference,* 336 F. 2d 650 (1964), contrary to the Opinion and Order as originally issued on July 30, 1964, and contrary to the opinion of the Presiding

Examiner. No evidence is cited by the Commission for this radical change of position other than its previous discussion in its Opinion and Order of July 30, 1964, and the wording of Agreement 8200 itself.

3. The Opinion and Order erroneously held that approved Agreement 8200 could not be lawfully carried out except following approval of the procedures adopted by the parties.

IV. *Relief Prayed*

WHEREFORE, petitioners pray that this Court enter an order:

1. Reversing the Opinion and Order entered by the Commission in Docket 872 insofar as it determines that Agreement 8200 does not authorize PWC and FEC members to act jointly in making ocean rates.

2. Suspending and enjoining the enforcement of said Opinion and Order insofar as it prevents petitioners from acting jointly in fixing ocean rates.

3. Granting to petitioners such other and further relief as the Court may deem appropriate.

Dated at San Francisco, California, this 30th day of December 1965.

Respectfully submitted,

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No. 71-130

In the Supreme Court of the United States

OCTOBER TERM, 1971

PACIFIC WESTBOUND CONFERENCE AND FAR EAST CONFERENCE, PETITIONERS

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	10
Conclusion	17

CITATIONS

Cases:

Associated-Banning Co. v. *Matson Navigation Co.*, 5 F.M. B. 336, 432	7, 12
Board of Commissioners of the Port of New Orleans v. *Federal Maritime Commission*, 440 F.2d 1312	10, 16
Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213	7
Consolo v. *Federal Maritime Commission*, 383 U.S. 607	14
Ex Parte 4, Section 15 Inquiry, 1 U.S.S.B. 121	7, 12
Isbrandtsen Co., Inc. v. *United States*, 211 F.2d 51, certiorari denied *sub nom. Japan-Atlantic and Gulf Conference* v. *United States*, 347 U.S. 990	12
Kempner v. *Federal Maritime Commission*, 313 F.2d 586, certiorari denied *sub nom. Gulf/Mediterranean Ports Conference* v. *Federal Martime Commission*, 375 U.S. 813	8, 9, 10
Mitsui Steamship Co. v. *Anglo Canadian Shipping Co.*, 5 F.M.B. 74	7

Cases—Continued Page

Overland and OCP Rates and Absorptions, 12 F.M.C. 184, affirmed *sub nom. The Port of New York Authority* v. *Federal Maritime Commission*, 429 F.2d 663, certiorari denied, 401 U.S. 909 ..... 5, 7, 14
Pacific Coast Port Equalization Rule, 7 F.M.C. 623, affirmed *sub nom. American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F.2d 185 ..... 7, 12
Pacific Coast European Conference, 4 F.M.B. 696 12
Port of New York Authority v. *Federal Maritime Commission*, 429 F.2d 663, certiorari denied, 401 U.S. 909 ..... 7, 15, 16
Volkswagenwerk v. *Federal Maritime Commission*, 390 U.S. 261 12

Statutes and regulation:

Administrative Procedure Act, 5 U.S.C. (1970 ed.) 552, 553 11
Reorganization Plan No. 7, 75 Stat 840 3
Shipping Act of 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*:
Section 15 ..... 2, 3, 7, 9, 10, 11, 12, 13
Section 16 ..... 7, 8
46 C.F.R. 537 13

Congressional:

House Committee on the Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. 805, 63d Cong., 2d Sess. (*"Alexander Report"*) 11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-130

PACIFIC WESTBOUND CONFERENCE AND FAR EAST CONFERENCE, PETITIONERS

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 440 F.2d 1303. The order and opinion of the Federal Maritime Commission (Pet. App. 27a-69a) are reported at 8 F.M.C. 553.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1971, and a petition for rehearing was

denied on April 28, 1971. The petition for a writ of certiorari was filed on July 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTIONS PRESENTED

1. Whether petitioners were prejudiced by the Commission's application of a standard not articulated in past cases as an alternative basis for finding a violation of Section 15 of the Shipping Act.

2. Whether the court of appeals' decision here conflicts with its later decision upholding unfiled agreements among individual conferences serving the Pacific Coast which permit independent setting of overland rates.

STATUTE INVOLVED

Section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, is set forth at Pet. App. 72a-74a.

STATEMENT

Petitioners are shipping conferences, each with a membership of approximately 20 shipping lines, which compete in the carriage of goods between the United States and the Orient (Pet. App. 4a).[1] Pa-

[1] A shipping conference is an association of ocean carriers which has as its principal function defining the trade area to be served by its members and establishing the trade rates in that area. Each petitioner operates under a conference agreement which has been approved by the Commission pursuant to Section 15 of the Shipping Act: Pa-

cific Westbound's members operate out of ports on the Pacific Coast, while Far East's members operate out of Gulf and Atlantic ports. Both serve essentially the same destinations in the Orient.[2] Each conference was formed in the early 1920's, and, with the exception of a joint conference agreement which lasted from 1925 to 1930, they made rates separately and competitively for the next thirty years (Pet. App. 4a). In 1952, the parties again entered into a joint agreement, Agreement No. 8200, which was approved by the Federal Maritime Commission under Section 15 of the Shipping Act.[3]

Agreement No. 8200[4] provided that promptly after Commission approval the parties would hold an initial meeting to make rules "* * * for the conduct of all meetings * * * and for the transaction of such other business as the parties may be permitted to conduct by virtue [t]hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any

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cific Westbound under Agreement No. 17, approved November 14, 1922; Far East under Agreement No. 57, approved January 1, 1923 (Pet. App. 3a-4a).

[2] The one exception is Thailand which Pacific Westbound alone serves (Pet. App. 68a).

[3] The Federal Maritime Commission came into existence in 1961 under Reorganization Plan No. 7, 75 Stat. 840; it took over the functions performed by its predecessor, the Federal Maritime Board. All references to the "Commission" refer to any of the Commission's predecessors where the sense of the sentence so requires.

[4] The full text of Agreement No. 8200, approved December 29, 1952, is set forth in the margin of the court of appeals' opinion (Pet. App. 7a-11a, n. 2).

subsequent meeting" (Pet. App. 9a). At the initial meeting action could be taken only by concurrence of each conference acting as a group (Pet. App. 8a-9a). The Agreement specifically reserved to each conference for the duration of the agreement the right of independent action to change tariffs, subject only to notice (Pet. App. 9a).[5]

On October 26, 1959, the Commission ordered an investigation to determine whether Agreement No. 8200 constituted the full and true agreement between petitioners and whether the agreement, or the manner in which the parties implemented it, violated the Shipping Act (Pet. App. 28a). A full evidentiary hearing, held pursuant to that order, disclosed that, in meetings held after the Commission's approval of Agreement No. 8200, petitioners had made additional agreements concerning rate-making which they had never filed with the Commission for Section 15 approval (Pet. App. 15a). These subsidiary agreements related to cargo which moved to the Orient from one of three "territories" within the United States: one territory "local" to each petitioner, and an "overland" territory (Pet. App. 36a, 38a).[6]

At a meeting held in January 1953, petitioners had agreed that they would continue to establish rates for cargo coming from the overland territory but

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[5] Other provisions of the Agreement dealt with admission of new parties, modes of notice, bearing of meeting costs, and duration (Pet. App. 10a-11a).

[6] Each conference had as local territory the coastal states which it served, while overland territory was comprised of the states not local to either conference (Pet. App. 64a-65a).

would make no change in the differentials that had previously existed between them (Pet. App. 38a, 67a).[7] With respect to goods shipped from the respective local territories, they had agreed to classify such goods as either "local initiative" cargo or "local competitive" cargo (Pet. App. 34a, 36a, 65a). The "local initiative" label was placed on a commodity if at least 70 percent of the combined total of that commodity from both local territories was shipped annually by one conference (Pet. App. 36a, 65a); that conference was then entitled to put the commodity on its initiative list, provided it first obtained the consent of the other conference. All commodities not appearing on the initiative lists of the two conferences came within the category of "local competitive" cargo.

From 1953 to 1956, the arrangements in effect between petitioners provided that the conference having an item on its initiative list could initiate a rate change on that commodity independently. After 1956, the concurrence of the other conference was required

[7] The differentials in ocean rates applicable to shipments originating in the overland territory date back many decades and were established in order to enable carriers serving the transpacific trade and Pacific Coast ports to compete with Gulf and Atlantic carriers and ports for cargo moving between the industrial interior of the United States and the Far East. See *Overland and OCP Rates and Absorptions*, 12 F.M.C. 184, affirmed *sub nom. The Port of New York Authority* v. *Federal Maritime Commission*, 429 F. 2d 663 (C.A. 5), certiorari denied, 401 U.S. 909. The overland rates are set in such a way that the total charges for transportation from the industrial center to the Orient via Pacific Coast ports are competitive with similar charges via Atlantic or Gulf Coast ports.

to alter the rate of such a commodity (Pet. App. 36a, 67a). Throughout the entire period, rate changes on local competitive cargo had to be made jointly (Pet. App. 34a).

Starting in 1957, Carnation Co., a large West Coast shipper of evaporated milk, made numerous requests to Pacific Westbound for a rate reduction on that commodity. Because more than 70 percent of evaporated milk moved through Pacific Westbound's local territory each year, the commodity qualified for that conference's initiative list (Pet. App. 36a-37a). Although Pacific Westbound expressed a willingness to reduce the rate and persisted in its efforts to obtain Far East's concurrence, Far East, which was moving only 10 percent or less of the volume of evaporated milk, refused because it sought to protect the revenue of its members on another commodity.[8] It was only after the Commission investigation, during the course of which petitioners' concurrence and initiative procedures first came to light, that Far East acceded to a rate reduction (Pet. App. 37a).[9]

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[8] A rate reduction on evaporated milk would have strengthened the hand of a large East Coast shipper, which had demanded an equivalent reduction of the rate on powdered milk (Pet. App. 37a).

[9] The conferences were pledged to confidentiality concerning their handling of requests for rate changes and never made public their agreements concerning initiative and concurrence procedures; the memoranda of agreements which they sent to the Commission were "somewhat abbreviated" (Pet. App. 15a). When Carnation learned of these agreements it filed a private treble damage antitrust suit against the conferences. See *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213.

On these facts, the Commission's hearing examiner concluded that petitioners' additional but unfiled agreements should have been filed with the Commission for approval under Section 15 (Pet. App. 30a). He further held that the petitioners, in implementing their additional agreements, had subjected Carnation to undue prejudice and disadvantage, in violation of Section 16 of the Act (Pet. App. 36a).

On exceptions, the Commission sustained its examiner and ordered the conferences to cease and desist (Pet. App. 69a).[10] It rejected petitioners' contention that the additional agreements were within the contemplation of Agreement No. 8200 (Pet. App. 30a), ruling that agreements dealing with initiative lists, concurrence procedures and maintenance of overland-rate differentials "were not routine, day-to-day arrangements" under the approved agreement,[11] and

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[10] On August 13, 1965, the Commission ordered a separate investigation into the lawfulness of overland rates maintained by Pacific Westbound and other conferences serving the Pacific Coast. The Commission held that the independent setting of these rates was lawful in *Overland and OCP Rates and Absorptions*, 12 F.M.C. 184; the court of appeals upheld the Commission in *Port of New York Authority* v. *Federal Maritime Commission*, 429 F. 2d 663 (C.A. 5), certiorari denied, 401 U.S. 909.

[11] The Commission relied on its earlier decisions under Section 15 involving application of the "routine action" doctrine. See *Ex parte 4, Section 15 Inquiry*, 1 U.S.S.B. 121; *Mitsui Steamship Co.* v. *Anglo Canadian Shipping Co.*, 5 F.M.B. 74; *Associated-Banning Co.* v. *Matson Navigation Co.*, 5 F.M.B. 432; and *Pacific Coast Port Equalization Rule*, 7 F.M.C. 623, affirmed *sub nom. American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185.

thus they should have been filed separately for scrutiny and approval under Section 15 (Pet. App. 31a). The Commission further found, as an alternative basis for requiring Section 15 approval of the supplementary agreements, that the arrangements they prescribed were not set forth in sufficient detail in Agreement No. 8200 so that "[a]ny interested party [would] be able, by a reading of the agreement [on file with the Commission], to ascertain how the agreement is to work, without resort to inquiries of the parties or an investigation by the Commission" (Pet. App. 32a). The examiner's conclusion that petitioners had subjected Carnation Co. to undue prejudice and disadvantage, in violation of Section 16 of the Shipping Act (Pet. App. 41a), was also sustained.[12]

Far East filed a petition with the Commission, seeking clarification of the extent, if any, to which petitioners could act together in the future with respect to rates. The Commission, in denying the petition, stated that Agreement No. 8200 did not sanction any joint rate-making action (Pet. App. 5a; P.R. 174-177).

Petitioners then filed a petition for review in the Ninth Circuit Court of Appeals. The petition was

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[12] The Commission rejected (Pet. App. 33a) petitioners' argument that it was estopped to deny approval of the additional agreements because of its alleged tacit approval of them. The Commission observed that the tacit approval doctrine had been rejected in *Kempner* v. *Federal Maritime Commission*, 313 F. 2d 586 (C.A.D.C.), certiorari denied *sub nom. Gulf/Mediterranean Ports Conference* v. *Federal Maritime Commission*, 375 U.S. 813.

transferred to the Fifth Circuit on the Commission's motion (Pet. App. 2a n. 1), and that court sustained the Commission's ruling as to the supplementary agreements on the ground that they could not be deemed to provide for merely routine interstitial rate adjustments; it stated that they "were significant agreements between two competitive conferences relative to ratemaking, conferring to each the power of veto over the rates of the other" (Pet. App. 14a).[13] They thus "were not contemplated by the plain language of Agreement No. 8200," the court below concluded, "and * * * they could not be lawfully entered into without prior Section 15 filing and approval of the Commission" (Pet. App. 14a).[14] At the same time, however, the court of appeals, looking to the language of Agreement No. 8200, reversed the Commission's subsequent holding, on Far East's clarification petition, to the effect that Agreement No. 8200 permitted

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[13] The court of appeals pointed out that the supplementary agreements also unlawfully affected the separate organic conference agreements of each petitioner, since the veto power conferred by the supplementary agreements enabled one conference to prevent members of the other from setting rates on their own, which their organic agreement empowered them to do (Pet. App. 14a-15a).

[14] The court below affirmed the Commission's rejection of the conferences' argument of administrative estoppel, relying both on the *Kempner* case (*supra*, n. 12) and on the scanty nature of the information provided by petitioners to the Commission (Pet. App. 15a). In addition, it affirmed the Commission's determination that petitioners had discriminated against Carnation Co. in violation of Section 16 of the Shipping Act (Pet. App. 21a).

no joint ratemaking by the conferences in the future (Pet. App. 17a).[15]

ARGUMENT

1. Petitioners object here (Pet. 8-10) only to the fact that the Commission, in reaching the conclusion that their additional agreements were not within the compass of Agreement No. 8200, articulated a legal standard "not articulated in past cases" (Pet. App. 32a).[16] They contend, not that this new standard

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[15] In a companion case, a group of Gulf and Atlantic ports sought review of the same Commission decision, claiming that the Commission had erred in not ordering Pacific Westbound to cancel its overland rate tariff until it had received Commission approval. The court of appeals in an opinion delivered on the same day as its opinion in the case at bar affirmed the Commission. *Board of Commissioners of the Port of New Orleans* v. *Federal Maritime Commission*, 440 F. 2d 1312 (C.A. 5).

[16] Petitioners have apparently abandoned their twice-rejected argument that the Commission was estopped from denying that it approved the additional agreements. Nonetheless, petitioners suggest that they kept the Commission fully informed of their additional agreements (Pet. 5, 8). This is neither accurate nor relevant. In fact, the conferences treated their additional ratemaking agreements as a matter of strict confidence (Pet. App. 15a). The information they sent the Commission was no more than abstracts of minutes of meetings (Pet. App. 33a). And, as the court stated: "* * * the public and the Commission were not informed of the manner in which these supplementary agreements were being carried out" (Pet. App. 15a). Furthermore, petitioners never sought Section 15 approval of these agreements, and, in view of the invalidity of the doctrine of tacit approval, can claim neither approval nor administrative estoppel. See *Kempner* v. *Federal Maritime Commission, supra.*

was impermissible as a matter of law, but only that its application in the present case was premature and failed to satisfy the rule-making procedures under the Administrative Procedure Act (5 U.S.C. (1970 ed.) 552, 553).

Even assuming *arguendo* that this argument has merit, petitioners are entitled to no relief in the circumstances of this case. For, while the Commission applied a new standard—*i.e.*, whether the agreement on file adequately details the arrangements and procedures of the concerted activity petitioners engaged in—which petitioners were unable to meet, the Commission did not rest its conclusion that the supplementary agreements were in violation of Section 15 of the Act on that ground alone.

In the alternative, the Commission held that the additional agreements were not within the scope of Agreement No. 8200 because these supplementary agreements "* * * were not routine, day-to-day arrangements * * *". properly implementing petitioners' rate-making authority under the initial agreement (Pet. App. 31a). This is an application of the traditional standard used by the Commission in resolving questions of this nature. Section 15 requires carriers to file with the Commission, *inter alia*, "every agreement" fixing rates, giving privileges, or controlling competition. The *Alexander Report*,[17] which contained the recommendations that were ultimately adopted by the

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[17] House Committee on the Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. No. 805, 63d Cong., 2d Sess. ("*Alexander Report*").

House and Senate reports on the Shipping Act of 1916,[18] stressed that mandatory filing would put an end to secrecy and would require carriers to bring their agreements out into the open and thus inform the public of what joint action they were taking. *Alexander Report, supra,* at 293-295, 311-313. Not long after passage of the Shipping Act, the United States Shipping Board (predecessor to the Commission) held that, to effectuate the purpose of the statute, all agreements of the kind set forth in Section 15 must be filed with the Commission, unless they could be categorized as "routine." *Ex Parte 4, Section 15, Inquiry,* 1 U.S.S.B. 121. Later decisions, both of the Commission and of the courts, have adhered to that principle, while at the same time narrowing the scope of what is routine. *Pacific Coast European Conference,* 4 F.M.B. 696, 702-703; *Associated-Banning Co.* v. *Matson Navigation Co.,* 5 F.M.B. 336, 342; *Pacific Coast Port Equalization Rule,* 7 F.M.C. 623, affirmed *sub nom. American Export & Isbrandtsen Lines* v. *Federal Maritime Commission,* 334 F. 2d 185 (C.A. 9); see also *Isbrandtsen Co., Inc.* v. *United States,* 211 F. 2d 51 (C.A.D.C.), certiorari denied *sub nom. Japan-Atlantic and Gulf Conference* v. *United States,* 347 U.S. 990.

It was, therefore, entirely proper for the Commission to apply the "routine action" standard to determine the validity of the supplementary agreements under Section 15. In so doing, it correctly concluded

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[18] See *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261, 276, n. 25.

that these significant, yet unfiled, agreements were not routine under existing Agreement No. 8200 (Pet. App. 32a, 53a). The court below agreed, declaring that the practical effect of the additional agreements was to give "each conference * * * veto power over the rates of the other" (Pet. App. 16a). Petitioners do not contest those rulings in this Court.

Accordingly, the fact that the Commission also found, in the alternative, that Section 15 had been violated by petitioners' failure to set out in adequate detail in the agreement on file—Agreement No. 8200—the procedures and arrangements contemplated by the supplementary agreements, is of no consequence in this case. While that ruling was concededly based on a standard "not articulated in past cases" (Pet. App. 32a), [19] the Commission was careful to point out in applying it here that "[t]his is not to say that we are limiting the scope of 'routine actions' which need not be the subject of section 15 filings; we are merely giving purpose to the requirements of the section" *(ibid.)*. Since it had already determined that the unfiled concurrence, initiative and overland-rate agreements were not routine—a determination not challenged in this petition—the Commission's alternative basis for invalidating those additional agreements under Section 15 was not needed. Nor was it relied upon by the court of appeals, which affirmed the cease and desist order only on the ground that

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[19] The Commission has since promulgated regulations, 46 C.F.R. Part 537, setting forth the detailed information that must be incorporated in conference and other agreements.

"the supplementary agreements were not incidental to or implementation of the basic conference agreement, and were certainly not routine * * *" (Pet. App. 16a).[20] There thus is no basis for petitioners'

[20] The court of appeals disagreed with the Commission's separate ruling that Agreement No. 8200 permitted no joint ratemaking by petitioners. It is argued that this reversal on the interpretation of the initial agreement required the Fifth Circuit to remand the case to the Commission for reconsideration of the question whether the supplementary agreements were "routine" under Agreement No. 8200, as so interpreted. A remand was plainly unnecessary in this case. Whatever the proper interpretation of Agreement No. 8200, it is evident that the Commission had already determined that petitioners' concurrence, initiative and overland-rate agreements were in any event not of a routine nature. In the case growing out of, and related to, the instant litigation (*Overland and OCP Rates and Absorptions, supra*, 12 F.M.C. at 213), decided prior to the decision at bar by the court of appeals (see n. 10, *supra*), the Commission explained this aspect of its ruling as follows: "* * * [Agreement 8200] was one between two conferences in different competitive trades; *although they were authorized to meet and agree upon the establishment or change of rates,* it was found that such authority did not cover a system of 'concurrences' and 'initiative items' under which one conference in effect surrendered its right even to initiate consideration of certain rate changes without the prior concurrence of the other. *This was hardly within the contemplation of ordinary rate-making procedure.*" (Emphasis added.) Thus, the Commission, in applying the "routine action" standard in the instant case, considered the supplementary agreements to be invalid even assuming that Agreement No. 8200 "authorized [petitioners] to meet and agree upon the establishment or change of rates." The court of appeals, having before it all the agreements in question, could properly find that the administrative record fully supported the Commission's conclusion in this regard. Thus, to the extent petitioners' citation of *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, is at all apposite to this

claim of prejudice.

2. Contrary to petitioners' argument (Pet. 12-13), there is no inconsistency between the decision below and the recent decision by the Fifth Circuit in *Port of New York Authority* v. *Federal Maritime Commission*, 429 F. 2d 663 (C.A. 5), certiorari denied, 401 U.S. 909.

In the *Port of New York* case, the court affirmed the Commission's ruling that an independent setting of overland rates by conferences serving the Pacific Coast, including Pacific Westbound, was within the scope of the ratemaking authority provided for in each of the approved conference agreements there involved. *Id.* at 668. The rationale was that overland rates and the absorption practices incidental to them, procompetitive in purpose and effect, were the well-established norm in the transpacific trade even before the passage of the Shipping Act and so "* * * such rates and practices constituted no more than routine rate making." *Id.* at 668.

In this case, by contrast, the unfiled, additional agreements were between two competing conferences and they inaugurated a system under which the relationship of the overland rates of one conference and the corresponding rates of the other was to be maintained; in addition, one conference in effect surrendered its right even to initiate consideration of certain rate changes without the advance concurrence

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case, that decision seems to support the court of appeals' affirmance of the cease and desist order, rather than to suggest, as petitioners apparently contend, that the case should have been remanded.

of the other. These agreements, then, by their very nature "were not incidental to or [in] implementation of the basic conference agreement [No. 8200], and were certainly not routine * * *" (Pet. App. 16a).

Clearly, the practices in *Port of New York* differ both in economic impact and historical background. As the court of appeals stated in a companion case to this, which involved Pacific Westbound's overland rates (*Board of Commissioners of the Port of New Orleans* v. *Federal Maritime Commission*, 440 F. 2d 1312, 1318 (C.A. 5)):

> We see no inconsistency insofar as the Commission rejected the concerted activities of two competitive conferences, one a Pacific Coast, the other an Atlantic Coast Conference, in regard to a supplementary agreement respecting overland rates, for failure to have prior Section 15 approval of the Commission, but accepted without such approval the vastly different practice—historically of long duration—of the several Pacific Coast conferences in establishing and using overland tariffs. We agree with the Commission's findings that overland rate-making within a single conference was routine whereas concerted collaboration between the two conferences in this regard was not.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 443679 183